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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

POWER AUTHORITY OF THE STATE OF NEW YORK,
Petitioner,

vs.

ERNEST L. FADEL and VARSEN FADEL, as Executrix of the Last Will and Testament of Edmund L. Fadel,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner POWER AUTHORITY OF THE STATE OF NEW YORK prays that a writ of certiorari be issued to review a final judgment of the Court of Appeals of the State of New York.

Citations to Opinions Below

The memorandum of the Court of Appeals (included in its judgment) is reported at 29 N.Y.2d 790, 327 N.Y.S.2d 358, and is printed in Appendix A hereto (*infra*, pp. 1a-3a). The order of the Court of Appeals denying reargument is reported at 30 N.Y.2d 582 (Appendix A, *infra*, p. 4a).

There were two separate decisions of the Supreme Court, Niagara County explaining an interlocutory judgment which resolved a question of title to illegally filled-in land in the Niagara River and decreed that respondents' alleged riparian rights were compensable. Neither was reported. Both are printed in Appendix A (*infra*, pp. 5a-57a). The memorandum of the Appellate Division of the Supreme Court affirming the interlocutory judgment without opinion is reported at 21 A.D.2d 854, 252 N.Y.S.2d 312 (Appendix A, *infra*, p. 58a). The decision of that court denying reargument and leave to appeal to the Court of Appeals is not reported (Appendix A, *infra*, pp. 59a-60a).

The memorandum decision of the Supreme Court, Niagara County with respect to the first of two final judgments awarding compensation for upland property and for alleged rights in land under water is not reported (Appendix A, *infra*, pp. 61a-62a). The opinion of the Appellate Division reversing such final judgment is reported at 27 A.D.2d 398, 279 N.Y.S.2d 830 (Appendix A, *infra*, pp. 63a-65a).

The Supreme Court rendered no opinion with respect to the second final judgment which also awarded compensation for upland property and for alleged rights in land under water. An appeal solely on the issue of the compensability of property rights in land below the high water mark and upland location value dependent on flow of the stream was taken directly to the Court of Appeals which affirmed that judgment.

Jurisdiction

The final judgment of the Court of Appeals is dated and was entered November 17, 1971. That court's order denying rehearing is dated and was entered February 17, 1972. On May 16, 1972 Mr. Justice Marshall signed an order (A-1195) granting petitioner an extension of time to file a petition for writ of certiorari to and including June 16, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Questions Presented

1. When a licensee of the Federal Power Commission condemns property pursuant to Section 21 of the Federal Power Act for a hydroelectric project on a navigable stream does it stand in the shoes of the United States with respect to the measure of damages to be paid for the property?

2. Did the United States exercise its dominant servitude over the waters of the navigable international Niagara River through the agency of petitioner pursuant to an international treaty, a specific act of Congress (mandating the issuance of a license to petitioner for the Niagara Project) and the Federal Power Act?

3. Is petitioner's development of hydroelectric power on the Niagara River for distribution and use in several states as mandated by a specific act of Congress and its Federal Power Commission license commerce under the Commerce Clause of the United States Constitution and under the rule of law that if property is condemned for a public project to promote commerce on a navigable stream value of riparian rights in land under water of the stream and upland location value dependent on flow of the stream are not compensable?

4. Is petitioner, a non-profit public corporation and a political subdivision of the State of New York, required to pay compensation for alleged riparian rights in land under the water of such stream and compensation based upon upland location value dependent upon the flow of such stream when condemnation is carried out pursuant to Section 21 of the Federal Power Act for purposes of such federally-licensed project?

Constitutional Provision, Treaties and Statutes Involved

The constitutional provision involved is the Commerce Clause of the United States Constitution, Article 1, Section 8, Clause 3. The treaties involved are the Treaty with Great Britain Concerning Boundary Waters between the United States and Canada, signed January 11, 1909, 36 Stat. 2448, and the Treaty with Canada Concerning the Uses of the Waters of the Niagara River, signed February 27, 1950, 1 U.S.T. 694, T.I.A.S. No. 2130. The statutory provisions involved are: the Federal Power Act, 16 U.S.C. §§ 791a *et seq.*, particularly Section 10(a), 49 Stat. 842, 16 U.S.C. § 803(a); Section 10(c), 49 Stat. 842, 16 U.S.C. § 803(c); and Section 21, 41 Stat. 1074, 16 U.S.C. § 814, thereof; the Niagara Redevelopment Act, 71 Stat. 401, 16 U.S.C. §§ 836, 836a; Section 111 of the Rivers, Harbors and Flood Control Authorization Act of 1970, (P.L. 91-611, 84 Stat. 1812, 33 U.S.C. § 595a); the Submerged Lands Act, 67 Stat. 29, 43

U.S.C. §§ 1301 *et seq.*, particularly 43 U.S.C. §§ 1301(e), 1311(a), 1311(b)(1), 1311(d), and 1314(a); and the New York Public Authorities Law, particularly Sections 1001, 1002, 1005(1), 1005(2), 1005(5), 1008 and 1012 thereof. The Commerce Clause; Articles 3, 4, 5, 7 and 8 of the 1909 Treaty; the 1950 Treaty; Sections 10(a), 10(c), and 21 of the Federal Power Act; the Niagara Redevelopment Act; 33 U.S.C. § 595a; 43 U.S.C. §§ 1301(e), 1311(a), 1311(b)(1), 1311(d), and 1314(a); and Sections 1001, 1002, 1005(1), (2) and (5), 1008 and 1012 of the Public Authorities Law are printed in Appendix B hereto (*infra*, pp. 1b-25b).

Statement

The 1950 Treaty with Canada came about (1) to reduce erosion of Niagara Falls which marred the scenic beauty and was so serious that it appeared the falls would ultimately be eliminated and the entire river upstream to Lake Erie would become a rapids perhaps dropping the level of Lake Erie, and (2) to increase the amount of water each country could use for hydroelectric power production. (R. A82, A147-48.)* The Treaty provided that the two countries would jointly construct remedial works to distribute the flow of the river more uniformly over the falls thus improving scenic beauty by reducing erosion and also provided that each country could utilize more water from the river for power purposes than allowed by prior international agreement.** It also provided that the remedial work be performed under the supervision of the International Joint Commission established under the 1909 Boun-

* The record before the New York Court of Appeals consisted of an Appellant's Appendix in which the page numbers were preceded by the letter A. Hereinafter, it will be referred to as the Record (R.) followed by an "A" page number.

** The quantity to be used was limited by requirements that stated minimum cubic feet per second be allowed to go over the falls with a higher minimum during set hours in the tourist season. (Article IV.)

dary Waters Treaty with Great Britain. The Senate conditioned its consent to ratification upon the parties agreeing that a reservation be attached to the Treaty providing that no further power development be constructed on the American side without specific approval of Congress. (96 Cong. Rec. 12093-95 (1950).)

The 1957 Niagara Redevelopment Act directed the Federal Power Commission to issue a license to petitioner for "a power project with capacity to utilize all the United States share of the water of the Niagara River permitted to be used by international agreement." (71 Stat. 401, 16 U.S.C. § 836(a).)

The Act required petitioner in selling power from the project to give preference to public bodies and domestic and rural consumers particularly those served by municipal electric systems and non-profit electric cooperatives and to sell the power at the lowest possible cost. It prescribed that part of the power be sold outside New York and required petitioner to pay the United States' share of the cost of the remedial works constructed in the river pursuant to the Treaty. The Act also authorized petitioner to construct a scenic parkway as part of the cost of the project. (*Id.*)

The Federal Power Commission in issuing a license to petitioner for the project found that "[t]he proposed project would affect navigable waters of the United States" and that "the proposed project is best adapted to a comprehensive plan for *development of the Niagara River for the use or benefit of interstate or foreign commerce*". (Exh. 44, p. 8, para. (1), p. 11, para. (7); emphasis supplied.)

The remedial work in addition to work at the falls proper included building control structures in the river which had among their purposes facilitating distribution of water over the falls, diversion of water into conduits on either side of the river for delivery to power houses below the falls and keeping the river above the structures at suitable elevations for navigation as required by the Inter-

national Joint Commission which monitored the work. The work also included considerable excavation in the river bed and straightening the shoreline on the American side. (R. A146-57, A170-74, A195-6.) Petitioner and The Hydro-Electric Power Commission of Ontario (HEPCO) shared the cost of the remedial work which was principally performed by HEPCO and petitioner with the Corps of Engineers doing a small part. (R. A146-47, A195-6.)

Petitioner for purposes of the Niagara Project condemned (1) land under water which had been largely filled in by respondents' predecessors in title which respondents claimed to own and (2) upland owned by respondents. The shoreline in front of respondents' property was straightened and fill excavated from the river was deposited on part of the property respondents owned. (R. A149-50, A156-57, A166.)

The Supreme Court, Niagara County, held that the State held title to the illegally filled-in land (which legally remained land under water) subject to riparian rights and easements therein held by respondents appurtenant to their ownership of the upland. (R. A80-81.) It found that petitioner acted as agent for the United States in constructing the project but refused to apply the rule of law that when land above the high water mark of a navigable stream is condemned for purposes of commerce, the Government's dominant servitude over the waters of the stream operates to preclude compensation for upland value dependent on flow of the stream and riparian rights in land under water appurtenant to the upland. (R. A88.) It held that compensation for the taking should include an amount measured by the value added to the upland by its proximity to the river. It also held that compensation should include the value of respondents' rights in the land under water which it held they did not own. It so held because it said the purpose of the project was not principally navigation but rather development of hydroelectric power which it said is not commerce within the meaning of commerce in

the United States Constitution. (R. A68-70.)* The Appellate Division affirmed without opinion. (R. A58.)

The Court of Appeals affirmed not on the ground relied on by the Supreme Court but rather on the ground that the right to exercise the United States' dominant servitude did not devolve upon petitioner operating under federal license. It said:

> "We find nothing in plaintiff's license or in the treaty and the legislative and administrative action and procedures underlying it, and certainly no clear authorization there or elsewhere, supportive of plaintiff's contention that the right to exercise the dominant servitude, in favor of the United States, in respect of defendants' water rights, devolved upon

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* Under New York law lands below the high water line of a navigable stream or boundary water belong to the State. *Saunders v. New York Central*, 144 N.Y. 75 (1894). The New York law was confirmed by the Submerged Lands Act of 1953, 67 Stat. 29, 43 U.S.C. §§ 1301 *et seq.*

By statute petitioner is empowered to exercise all of the State's rights in the bed and waters of the Niagara River for a project to improve commerce and navigation. Section 1008 of the New York Public Authorities Law provides:

> "The state of New York hereby consents to the occupation and use by the authority [petitioner herein] of any and all property of the state of whatever kind or character on the Niagara river or within the international rapids section of the Saint Lawrence river, and hereby vests the authority with and delegates to it the right to exercise any and every right and power of the state in connection therewith, whether proprietary or sovereign in character, which the state itself might exercise, provided that such consent and delegation of power shall not permit the impairment or limit or prevent the future improvement of the navigability of the Niagara river or the international rapids section of the Saint Lawrence river, consistent with the maintenance of such projects, but on the contrary the projects shall be such as will improve and benefit commerce and navigation therein and provided further that the authority shall have no power to limit, waive or surrender any right or interest of the state of New York in such rivers or the use thereof." (Appendix B, *infra*, p. 21b)

it, so as to exempt it from payment of compensation for their taking. (*Federal Power Comm.* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 249; *Henry Ford & Son* v. *Little Falls Fibre Co.*, 280 U.S. 369; *Public Utility Dist. No. 1 of Pend Oreille County* v. *City of Seattle*, 382 F.2d 666.) Our conclusion in this regard renders academic the other issues tendered by the appeal." (29 N.Y.2d 790, 792.)*

The federal questions sought to be reviewed were raised in the court of first instance on settlement of the interlocutory judgment which that court directed be entered after trial of the issue of title to land involved in the condemnation proceeding.** The court reopened the trial and

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* The court's order denying reargument said:

"A motion for reargument or, in the alternative for amendment of the remittitur in the above cause to this Court having heretofore been made upon the part of the appellant herein * * * it is

"ORDERED, that the said motion, insofar as it seeks reargument, be and the same hereby is denied, and it is

"ORDERED, that the said motion, insofar as it seeks amendment, be and the same hereby is denied upon the ground that the decision of this Court (29 N.Y.2d 790) indicates the Federal question necessarily passed upon." (Appendix A, *infra*, p. 4a.)

** The court resolved in favor of petitioner a dispute as to the boundary between upland concededly owned by respondents and illegally filled-in land under water owned by the State. However it held that while the State owned the illegally filled-in area respondents owned riparian rights in such area "appurtenant and incidental to the ownership of the uplands". It said:

"* * * These riparian rights include easements of view and right of access to the navigable part of the river, the right to make a landing, wharf or pier for their own use or for the use of the public, and all other rights incident thereto, and the exclusive right under Public Lands Law, § 75, subdivision 7, to apply to the State of New York for a grant of the lands under water adjacent to their uplands. * * *" (R. A80.)

Thus the court held that respondents owned property interests in land under water, i.e., below the high water mark, and were entitled to be compensated for them.

held hearings on the issue of compensability of riparian rights and accepted uncontroverted evidence on the effect of the Niagara Project on navigation and on the specific purpose for which the property was condemned.* (R. A133-214). Petitioner appealed to the Appellate Division the interlocutory judgment entered after such hearing to the extent it held value of alleged riparian rights in land under water and value of upland based upon flow of the river to be compensable. After the Appellate Division affirmed the interlocutory judgment and denied petitioner's motion for reargument or in the alternative for leave to appeal to the Court of Appeals on certified questions, petitioner raised the issues here presented in the trial court on two separate motions for appointment of Commissioners of Appraisal, on two separate motions by respondents to confirm the Commissioners' reports and on an appeal to the Appellate Division from the first of two final judgments entered upon confirmation of Commissioners' reports. As already indicated it raised the questions in the Court of Appeals upon direct appeal to that court from the second final judgment.**

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* This testimony was presented by petitioner not because it believed it relevant but because respondents made the subject of the testimony an issue and the court considered it relevant.

** The first final judgment awarded respondents $107,059 plus interest including $5,582 as the value of the riparian rights in land under water and location value of upland dependent on flow. (R. A37.) The second final judgment awarded $90,800 plus interest including $5,000 for the value of riparian rights in land under water and location value of upland dependent on flow. (R. A8.) The amount awarded for riparian rights and location value was separately stated pursuant to direction of the trial court at petitioner's request. In the Court of Appeals petitioner did not challenge the award except to the extent that it included compensation for value of riparian rights and upland location value. It did not contest the dollar amount awarded for such rights and upland value. The judgment has long since been paid except for the $5,000 which has been placed in escrow. Costs and counsel fees have also been paid.

Reasons for Granting the Writ

Petitioner in acquiring respondents' property exercised the federal power of eminent domain (Federal Power Act § 21, 16 U.S.C. § 814; *Federal Power Commission and Power Authority of the State of New York* v. *Tuscarora Indian Nation,* 362 U.S. 99, 120, 124 (1960); *Tuscarora Nation of Indians* v. *Power Authority of the State of New York,* 257 F.2d 885, 892-94 (2d Cir., 1958), *vacated and remanded for dismissal of the complaint as moot,* 362 U.S. 608 (1960)). In the latter case the Second Circuit said:

> "• • • The licensee by virtue of Section 814 [Federal Power Act, § 21] becomes vested with the governmental power of eminent domain. The exercise of the right is thus the act of an agency of the sovereign." • • •" (257 F.2d 894).

The development of power from the flow of a navigable stream constitutes a valid exercise of the Commerce Clause. The destruction, abridgement or curtailment of location value dependent on flow of the stream and value of riparian rights in the stream through exercise of the Government's prerogative to employ the water for commerce is not compensable. U.S. Constitution Art. 1, § 8, Cl. 3; *United States* v. *Appalachian Power Company,* 311 U.S. 377 (1940); *United States* v. *Commodore Park, Inc.,* 324 U.S. 386 (1945); *United States* v. *Twin City Power Co.,* 350 U.S. 222 (1956); *United States* v. *Grand River Dam Authority,* 363 U.S. 229 (1960); *United States* v. *Virginia Electric & Power Co.,* 365 U. S. 624 (1961); *Federal Power Commission* v. *Union Electric Co.,* 381 U.S. 90 (1965); *United States* v. *Rands,* 389 U.S. 121 (1967).

While the trial court in the instant case found that petitioner exercised the federal power of eminent domain and recognized that riparian rights in land under the water of a navigable stream and location value dependent on stream flow are not compensable when the stream is developed for commerce it decided that the development of hydroelectric power on the Niagara River is not commerce because in its

view the only type of activity which constitutes commerce on a river is boats plying the river.* (R. A90, A68-70.)

In the *Appalachian* case, *supra*, this Court said:

> "In our view, it cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. *By navigation respondent means no more than operation of boats and improvement of the waterway itself. In truth the authority of the United States is the regulation of commerce on its waters. Navigability, in the sense just stated, is but a part of this whole.* * * *" (311 U. S. at 426; emphasis supplied.)

In *Twin City, supra*, a power company owned enough land on both sides of the Savannah River to build a power project for which it sought a Federal Power Commission license. The United States condemned the land for a larger power project which the Corps of Engineers built pursuant to Section 10 of the Flood Control Act of 1944 (58 Stat. 887). Two district courts and two courts of appeals held that the power company's property must be valued on the basis of uses to which it could be put because of the flow of the stream because, they said, the purpose of the project was not navigation but power. The Fifth Circuit said that navigation instead of being improved was eliminated by a solid dam. It said that the Government had taken the power company's land not for "improvement of navigation" but for "water power development" *(United States v. Twin City Power Co. of Georgia*, 221 F.2d 299, 302 (1955)).

This Court reversed in a five-to-four decision. The majority discussed the fact that a Corps of Engineers letter indicated that some possible aid to navigation might result

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* The court found that the "primary purpose" of the project was "developing hydro-electric power" and stated that "* * * the Federal Government's prime interest in respect to navigation is to properly see to it that nothing is done to interfere with the navigability of the Niagara River, not to promote or improve its navigability." (R. A68-69).

from the project but reversal was not based on that ground. The majority opinion stated:

> "• • • If the interests of navigation are served, it is constitutionally irrelevant that other purposes may also be advanced. *United States* v. *Appalachian Power Co.*, 311 U.S. 377. 377, 426; *Oklahoma* ex rel. *Phillips* v. *Atkinson Co.*, 313 U.S. 508, 525, 533-534. As we said in the *Appalachian Power Co.* case, 'Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control.' 311 U.S., at 426." (350 U.S. at 224.)

The 1956 decision in *Twin City* was followed in 1961 by *Virginia Electric, supra,* in which the Court unanimously held that a power company whose land was condemned by the United States for a power project also constructed pursuant to Section 10 of the Flood Control Act of 1944 was not entitled to any valuation based upon location of the land adjacent to a stream considered navigable. The Supreme Court opinion did not mention navigation.

Both cases make very clear that the development of hydroelectric power is commerce under the Commerce Clause. However, the uncontroverted evidence in the instant case shows that considerable benefit to navigation resulted from the Niagara Project. For example, ice control which resulted from straightening the shoreline with material excavated in removing shoals as was done adjacent to respondent's property helped navigation materially. The remedial work by reducing erosion of course helped navigation. (R. A146-57, A170-74, A195-96.)

In *Twin City* and *Virginia Electric* letters from the Corps of Engineers printed in Congressional documents indicated that the contingent minimal effects of those projects on navigation were less substantial than the effect that uncontradicted evidence in the instant case shows occurred at the Niagara Project. (H.R. Docs. No. 650, No. 657, 78th Cong. 2d Sess. (1944).)

Even if there were no navigational features to the Niagara Project respondents' riparian rights nevertheless would not be compensable because the Government's dominant servitude exercised on the Niagara River adjacent to their property is derived from the Commerce Clause which allows exercise of the servitude for various types of commerce not just navigation.

While most Supreme Court cases dealing with the principles here involved discuss navigation they do so because historically discussions of the Government's dominant servitude over navigable streams involved situations where navigation was affected. The servitude became known as the navigation servitude even though that is much too narrow a description of it.*

The principle which *Appalachian, Twin City* and *Virginia Electric* expound is that the Constitution gives the Government plenary power to control navigable streams. It is the navigability of the stream which supplies such plenary jurisdiction to the Government. This plenary power includes complete power over the stream to the high water mark. It includes the power to develop the stream or to ordain development of the stream for commerce and in doing so to eliminate riparian rights of adjoining owners. The power extends so far as to allow such elimination of riparian rights without compensation. If the Government decides to develop a stream for commerce it makes no difference whether navigation is involved or not. The Government can go so far as to improve the stream for commerce and in doing so eliminate navigation. All this is within its power and when performed elimination of riparian rights is not compensable. *(United States* v. *Commodore Park, Inc., supra.)*

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* For a discussion of the development of the doctrine of the Government's dominant servitude see Brief for the United States as Amicus Curiae at 33 to 47, *Grand River Dam Authority* v. *Grand Hydro,* 335 U.S. 359 (1948). See also *Federal Power Commission* v. *Union Electric Co.,* 381 U.S. 90 (1965).

The Submerged Lands Act of 1953 (43 U.S.C. §§ 1301 *et seq.*) by which the United States conveyed title to lands under the waters of navigable streams to some states and confirmed the titles claimed by other states provides that the title conveyed "does not include water power, or the use of water for the production of power". (43 U.S.C. §§ 1301(e), 1311(a).) This is in effect restated in 43 U.S.C. § 1311(d). In addition the Act specifically states that: "The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, * * *." (43 U.S.C. § 1314(a).)

The Submerged Lands Act not only affirms the findings of the courts with respect to the Government's dominant servitude over navigable streams but makes clear that this servitude applies to commerce in the form of power production as well as to navigation.

The New York Court of Appeals' reliance upon *Federal Power Commission* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239 (1954), and *Henry Ford & Son* v. *Little Falls Fibre Co.*, 280 U.S. 369 (1930), was misplaced. Neither case involved the exercise of the power of eminent domain and neither sustains the compensability of respondents' riparian rights.

In the *Ford* case a Federal Power Commission license had been granted to Ford to build a power plant on Federal property to take advantage of surplus water from a Federal dam on the Hudson River. In 1925 pursuant to authorization of the Secretary of War, Ford installed flash boards on top of the dam increasing its height by two feet and consequently reducing the head of water available to Little Falls at a power plant which it operated pursuant to a state license on the Mohawk River above the confluence of the Mohawk and the Hudson.

New York state courts held that Little Falls had a right to the free flow of the Mohawk River and that this right was a riparian right and thus a property right. (*Little Falls* v. *Ford*, 127 Misc. 834 (1926), *aff'd*, 223 App. Div. 559

(1928), *aff'd*, 249 N.Y. 495 (1928)). The state courts granted Little Falls an injunction against use of the flash boards and awarded damages.

In this Court Little Falls challenged the validity of Ford's license.* This Court did not consider the validity of the license because it held that even if the license were valid there was nothing in the Federal Water Power Act to authorize Ford to destroy rights held by Little Falls under state law. The Court pointed out that none of Little Falls' property or property rights had been condemned and did not reach the question of whether Ford could have condemned them under Section 21 of the Federal Water Power Act.

Although *Ford* has been cited time after time by condemnees, this Court has refused to follow it in subsequent cases which make clear that riparian rights eliminated in connection with power projects on navigable rivers are not compensable. The property owners in *Twin City* and *Virginia Electric* relied upon *Ford* in support of their contention that they should be compensated for the riparian value of their property. This Court did not refer to *Ford* in either decision. *Ford* was last cited by this Court in *Niagara Mohawk, supra,* also cited and relied on by the Court of Appeals in the instant case.

The *Niagara Mohawk* case has no substantial relevance to the issues raised by this petition. Niagara Mohawk's predecessors the Niagara Falls Power Company and the International Paper Company had obtained state grants in the last century and early in this century allowing them to divert specified quantities of water from the Niagara River for power purposes.

The Paper Company transferred its rights to divert water to the Power Company in return for an agreement by the Power Company to make annual compensation. Niagara Mohawk later acquired the power plants built by the Power

* There was no challenge made to the validity of Little Falls' state license.

Company, the license issued for the plants and the rights which the Power Company had acquired from the Paper Company.*

Under its license, Niagara Mohawk was required to report annually to the Federal Power Commission the amount of profit made from its project. The Government had a right under Section 14 of the Act to recapture the project at the expiration of the license upon compensating the licensee for its net investment. Pursuant to Section 10(d) of the Act and its license Niagara Mohawk was required to place in an amortization reserve half of its profits in excess of 6% which would be used to reduce its net investment.**

In determining the amount of profit the Commission refused to allow Niagara Mohawk to count as expenses the payments to the Paper Company for use of water rights. The Commission's theory was that since the Government owns rights in the flow of the Niagara River dominant over rights the State granted to the Power Company and the Paper Company, the Government in taking over the licensed project should not have to pay any amount measured by what the licensee paid for State-granted rights.

In a four-to-three decision, this Court held that the Commission could not disregard the payments Niagara Mohawk was required to make under its agreement with the Paper Company. The Court concluded that even though the water rights involved were "within the scope of the Government's dominant servitude" the Government had not merely by enactment of the Federal Water Power Act and issuance of a license under it exercised its power to abolish such

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* The State grants had been made and the plants had been built before the passage of the Federal Water Power Act of 1920 (Part I of the present Federal Power Act). The first license issued under the Act covered these plants.

** Recapture provisions while still in the Federal Power Act do not apply to publicly-owned projects such as petitioner's. (Act of August 15, 1953, Public Law 83-278, 67 Stat. 587; Act of July 31, 1959, Public Law 86-124, 73 Stat. 271.)

rights. Citing favorably the *Ford* case upon which Niagara Mohawk relied the majority said that clear Congressional intent was necessary to permit destruction of rights admittedly valid under state law and that such intent could not be found in the Federal Water Power Act. (347 U.S. at 248-53.)

The dissenting Justices agreed that Niagara Mohawk might be under a legal duty to pay the Paper Company but took the position that the Commission nevertheless could lawfully disregard such payments. They construed the majority decision "as requiring the United States to pay for something it already owns". (347 U.S. at 259.)

The most the decision in *Niagara Mohawk* did was to give special recognition to "water rights" vested by state law. Niagara Mohawk became vested with the rights to divert water from the Niagara River pursuant to specific grants the State made to its predecessors in title for which both Niagara Mohawk and its predecessors became obligated by contract to pay the State.*

The decision in *Niagara Mohawk* was distinguished and limited by this Court two years later in *Twin City, supra,* where the Court said:

> "* * * The legislative history and construction of particular enactments may lead to the conclusion that Congress exercised less than its constitutional power, fell short of appropriating the flow of the river to public domain, and provided that private rights existing under state law should be compensable or otherwise recognized. Such were *United States* v.

* The State granted no water rights to respondents or their predecessors in title in the instant case. A portion of respondents' "upland" which petitioner conceded they owned had been filled in by respondents' predecessors in title. This land was below the original high water mark of the river. The State had granted respondents' predecessors in title fee title to this land thereby approving its filling-in. The trial court held that this land belonged to respondents without objection by petitioner. Respondents have been compensated for it.

> *Gerlach Live Stock Co., supra,* and *Federal Power Commission* v. *Niagara Mohawk Power Corp., supra.* * * *" (350 U.S. at 225.)

The situation in the instant case is similar to that in *Twin City* but is not similar to that in *Niagara Mohawk.*

The New York Court of Appeals in its decision also relied on *Public Utility District No. 1 of Pend Oreille County* v. *City of Seattle,* 382 F.2d 666 (9th Cir. 1967), *cert. dismissed pursuant to Rule 60,* 369 U.S. 803 (1969). In that case the City of Seattle applied to the Federal Power Commission for a license to construct a hydroelectric power project on a navigable stream. The Public Utility District intervened in the proceeding before the Commission and filed a competing license application for a project one mile upstream from the City's proposed project. The two projects were mutually exclusive. The Commission granted the City's application and denied the District's application. The City then brought an action in United States District Court pursuant to Section 21 of the Federal Power Act to condemn property the Public Utility District had acquired for its proposed project upstream from the City's project.

The United States Court of Appeals for the Ninth Circuit in affirming the condemnation award of the District Court held (in a 2-to-1 decision) that the City as a licensee of the Federal Power Commission could not "assert the Government's dominant navigational servitude; that if shorelands are necessary to its projects they must be *taken* in the constitutional sense, and compensation for the taking must follow". (382 F.2d at 672; emphasis in original.) The "shorelands" referred to by the court was property situated below the ordinary high water level of the river.

The majority of the court also said that "as to Federal licensees not exercising the Government's navigational servitude, full market value, including power site value, is the proper measure of compensation" for uplands taken in connection with a power project.

The court affirmed an award for damages for the "shorelands" which was separate and apart from the award for the upland.*

The third judge dissented on the ground that every consideration of logic and equity requires that the rights of condemnors and condemnees be the same regardless of what agency builds such projects. After discussing *Grand River Dam Authority* v. *Grand-Hydro,* 335 U.S. 359 (1948), and pointing out that this Court had expressly left open for future determination the question of what would be the appropriate measure of value in a condemnation action brought by a licensee in reliance on rights derived under the Federal Power Act, he stated:

> "In my opinion, when a licensee chooses to exert the powers granted to it by instituting an action pursuant to Section 21 of the Act, it is entitled to the concomitants of that power including the benefit of the federal navigation servitude." (382 F.2d at 675.)

Both sides petitioned this Court for certiorari but asked it to defer consideration pending settlement of differences between them, some having no relation to the project involved in the litigation. This Court agreed and upon being advised that settlement had been effected granted a joint motion to dismiss the petitions under Rule 60.

The majority in the *Seattle* case appears to have relied upon the *Ford* and *Niagara Mohawk* cases. One of the bases of their finding that the Federal Power Act did not place Seattle as licensee in the shoes of the United States was the assumption that the United States when it builds projects operates on a national scale whereas when it licenses others to build projects normally only local considerations are involved. This is of course not the situation in the instant case where two treaties and a specific act of Congress mandated the construction and operation of an international multipurpose project. Neither is it the situation in a great many

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* Thus in both the instant case and *Seattle* the condemnation actually covered land under water and compensation was awarded for it.

other hydroelectric projects including pumped storage projects which are becoming increasingly numerous during this period of frequent emergency short-duration power shortages.

The majority in *Seattle* referred to the fact that Section 10(c) of the Federal Power Act requires the licensee rather than the United States be liable for damages occasioned to the property of others by the construction, maintenance and operation of project works. In enacting Section 10(c) Congress was protecting the United States and the statute did not create any rights which property owners would not otherwise have. Their rights to maintain structures in navigable rivers with appropriate Federal and State authorizations are subordinate to the Government's navigational servitude which licensees under the Federal Power Act are delegated to exercise.

Another argument made by the majority to sustain their position was that the Government's dominant servitude operates "in the nature of an easement which avoids all need for taking" rather than as a rule of law to be applied in a condemnation proceeding. This is not correct because the principle that when the Government's dominant servitude is exercised to promote commerce riparian rights are not compensable has been established in a long succession of condemnation cases involving the Federal Government.

However the *Seattle* case and the instant case are the only ones to hold that the Government or a licensee must condemn an upland owner's qualified right to maintain structures in a navigable river in order to exercise the dominant servitude in the interest of commerce.

This Court has unequivocally held that when the United States through one of its instrumentalities exercises its dominant servitude in navigable waters over which the Commerce Clause gives Congress jurisdiction by constructing a hydroelectric power project valuation of condemned

property shall not include any upland location value dependent upon flow of the stream or claimed riparian rights in the stream (*Virginia Electric, Twin City, supra*). However it has not unequivocally decided whether the same rule prevails when the United States instead of exercising the servitude by constructing the project delegates a state, a municipality or a public corporation to exercise the servitude and build the project.

In *Grand River Dam Authority* v. *Grand-Hydro, supra,* the question was considered by this Court upon a writ of certiorari to a state court. In that case a public authority created by Oklahoma had obtained a Federal Power Commission license to build a power project and condemned a dam site owned by a private utility company which had a state permit to construct the project but had been unable to obtain a federal license. The condemnation was strictly under state law in state courts and the public authority did not base its right of condemnation on the Federal Power Act or on any federal license issued thereunder. It abjured operating pursuant to Section 21 of the Federal Power Act which it had a right to do.

This Court in a five-to-four decision affirmed the Oklahoma Supreme Court's decision that the public authority had to pay for the riparian values but did so solely on the ground that the public authority had proceeded strictly under Oklahoma law rather than under Section 21 of the Federal Power Act.* The majority specifically left undecided the question of "what would be the appropriate measure of value in a condemnation action brought by the United States or by one of its licensees in reliance upon rights derived under the Federal Power Act." (335 U.S. 373.)

The four dissenting Justices voted to reverse on the ground that the United States through the Federal Power

* The Supreme Court pointed out that the parties had stipulated that if they could not agree on valuation they would leave it up to a state condemnation court to decide. (335 U.S. at 364).

Act had asserted "exclusive dominion and control" over the water of the river involved. They held that the property owner had no private claim for riparian rights which the law could recognize.

The Rivers, Harbors and Flood Control Authorization Act of 1970 (Public Law 91-611, 84 Stat. 1818) enacted December 31, 1970, included as Section 111 (33 U.S.C. § 595a) a provision relating to damages to be paid by the United States for the condemnation of upland—not land under water—"in connection with any improvement of rivers, harbors, canals or waterways of the United States."

Section 111 provides:

> "In all cases where real property shall be taken by the United States for the public use in connection with any improvement of rivers, harbors, canals, or waterways of the United States, and in all condemnation proceedings by the United States to acquire lands or easements for such improvements, the compensation to be paid for real property taken by the United States above the normal high water mark of navigable waters of the United States shall be the fair market value of such real property based upon all uses to which such real property may reasonably be put, including its highest and best use, any of which uses may be dependent upon access to or utilization of such navigable waters. In cases of partial takings of real property, no depreciation in the value of any remaining real property shall be recognized and no compensation shall be paid for any damages to such remaining real property which result from loss of or reduction of access from such remaining real property to such navigable waters because of the taking of real property or the purposes for which such real property is taken. The compensation defined herein shall apply to all acquisitions of real property after the date of enactment of this Act, and to the determination of just compensation in any condemnation suit pending on the date of enactment hereof."

The specific terms of the statute make clear that it does not apply to the judgment here sought to be reviewed to the extent that it grants compensation for property rights below the high water mark of the Niagara River. We do not believe that it applies to the part of the judgment which grants compensation for upland location value.

Section 111 grew out of a bill introduced in both the House (H. R. 17505) and Senate (S. 3815) in 1970. The bill was drastically different from Section 111 as enacted. The bill would have amended Section 301 of the Land Acquisition Policy Act of 1960 (33 U.S.C. § 596).* The House Committee on Public Works took some of the language of the bill and added some new language and incorporated the product in the Rivers, Harbors and Flood Control Authorization bill which it reported to the House. (H. R. Rep. 1665, 91st Cong., 2d Sess. (1970).) The House passed the authorization bill with that language included as Section 112. The Senate Committee on Public Works considered the original bill but did not report on it. The Senate passed its own version of a Rivers, Harbors and Flood Control Authorization bill but without any of the substance of Section 112 of the House bill. Section 112 of the authorization bill as passed by the House became Section 111 of the Rivers, Harbors and Flood Control Authorization Act of 1970 as passed by the two houses on the basis of the Conference Committee Report. (H. R. Rep. 1782, 91st Cong., 2d Sess. (1970).)

The original bill out of which Section 111 grew would have added the following sentence to Section 301 of the Land Acquisition Policy Act of 1960 (33 U.S.C. § 596):

> "The just and reasonable consideration to be paid for property taken by the United States above the normal high water mark of navigable waters in the United States shall be the fair market value of such property, including the value of any riparian use which may exist at the time of taking of such prop-

* Section 301 of the Land Acquisition Policy Act of 1960 (33 U.S.C. § 596) was subsequently repealed by Section 306 of the Uniform Relocation Assistance and Real Property Acquisition Policy Act of 1970 (Public Law 91-646, 84 Stat. 1894).

erty or for which such property would be suited with reasonable probability in the foreseeable future, and disregarding the exercise of any navigational servitude of the United States involved in the taking itself or any potential future exercise of such servitude."

The following significant changes were made in the original bill by the House Committee and adopted by the whole Congress:

1. The words: "disregarding the exercise of any navigational servitude of the United States in the taking itself or any potential future exercise of such servitude", were deleted from the original bill. This strongly suggests that Section 111 as enacted was not intended to provide for valuation of upland based on uses which could be eliminated by exercise of the servitude.

2. The original bill would have applied to all takings of land above the high water mark regardless of the purpose for which taken. The language of Section 111 limits its application to property taken "in connection with any improvement of rivers, harbors, canals or waterways of the United States". There is no suggestion in the report of the House Committee on Public Works or of the Conference Committee that under its limiting language the Act was intended to apply to hydroelectric developments.

3. The original bill would have provided compensation for "the value of any riparian use" whereas Section 111 where it applies provides for valuation based on uses "dependent upon access to or utilization of such navigable waters".

4. The provision in Section 111 with respect to partial takings was not in the original bill. That provision in effect makes the Act take away more than it gives in the case of partial takings by providing that no depreciation in the

value of land not taken will be recognized if based upon lack of access and no compensation will be paid for any damages to land not taken based on deprivation of access or based on the purpose for which the property is taken.* Nevertheless, the Act left standing another section of Title 33 of the United States Code which provides that in cases of partial takings any increase in value of land not taken resulting from the project should be deducted from the award. (33 U. S. C. § 595).

By its terms Section 111 applies to all condemnation cases pending at the time of its enactment. The case sought to be reviewed was pending because at that time an appeal had been taken from the final judgment of the Supreme Court Niagara County to the New York Court of Appeals. Therefore Section 111 is a subject for the Court's consideration in connection with this petition. Nevertheless, we believe that the principles sought to be established by petitioner are as valid since the enactment of Section 111 as before.

The instant case squarely raises the question of whether a licensee of the Federal Power Commission in condemning land pursuant to the Federal Power Act for a hydroelectric power project on a navigable stream stands in the same position as the United States would stand as far as payment of compensation for upland and compensation for alleged riparian rights in land under water adjacent to such upland is concerned if the United States had exercised its dominant servitude over the stream through one of its instrumentalities rather than through the licensee. It also

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* As the law has always been, if land above the high water mark was taken for a power plant and contiguous land in the same ownership was not taken, the owner would be entitled to consequential damages for the part not taken based upon any depreciation in value other than the value dependent upon flow of a navigable stream.

squarely raises the question of whether production of hydroelectric power on such a stream is commerce within the Commerce Clause.

The amount awarded for alleged riparian rights in land below the high water mark and for location value of upland in the instant case is not large and the amounts to be awarded in the remaining Niagara cases which are still pending if the holdings of the courts below prevail are not likely to be of great magnitude. The largest amount claimed as total damages in any of those cases is $500,000. However an example of how important the principle is from an economic standpoint was experienced by petitioner at its St. Lawrence Project. Prior to this Court's decision in *Twin City* the owner of a large amount of land along the St. Lawrence River which petitioner acquired by eminent domain made a claim for $20,000,000 alleging value based on rights in land under water and on location value of upland. After the decision in *Twin City* the claim was settled for one-tenth of that amount as a direct result of the decision.

The issues raised by this petition are extremely important to petitioner and other non-federal public entities which construct hydroelectric power projects. Petitioner has been delegated by state legislation to construct whatever additional pumped storage projects are necessary to relieve the critical power situation in New York. It is presently building a one million kilowatt plant on a non-navigable tributary to a navigable stream and expects to build several more huge plants at least some of which will undoubtedly be on navigable streams.

The resolution of the issues in the instant case by the Supreme Court is important not only because of their bearing on condemnation of land for petitioner's projects and those of others, but also because the Niagara River is regulated by petitioner and HEPCO for several miles upstream of respondents' property. No condemnation proceedings were brought in this section of the river because the upland is not affected by the raising and lowering of water and ice

by the regulation. Claims are made by upland owners who have built structures below the high water mark that the structures are damaged by the regulation*. They seek compensation from petitioner on the basis of the holdings of the courts below in the instant case.

Thus upland owners contend that the decisions in the instant case support their argument that they have rights in the river below the high water mark with which petitioner may not interfere by its regulation of the water pursuant to the 1909 and 1950 Treaties without making compensation.

If petitioner by its regulation of the river were to cause damage to upland the owners would of course be entitled to compensation under the Fifth Amendment. However, upland owners contend that even if there is no damage to upland they are entitled to compensation for alleged damage to structures below the high water mark whether built legally or illegally. Section 10(c) of the Federal Power Act provides that the United States will not be responsible for damage caused to property by construction or operation of licensed projects. Article IX of the 1950 Treaty declares that Canada will not be responsible for damage caused on the United States side of the Niagara River by acts performed pursuant to the Treaty. Hence, petitioner would be required to make compensation if compensation were awarded.

To hold upland owners to be entitled to compensation for damages to structures placed in a navigable stream below the high water mark because of exercise of the Government's dominant servitude would be equivalent to holding that the owner has rights in the stream superior to the Government's dominant servitude rights. A licensee such

* The regulation is carried out under direction of a Joint Board established pursuant to the 1909 and 1950 Treaties. Petitioner's license (Article 13) as required by Section 18 of the Federal Power Act provides that the project shall be operated pursuant to rules in the interest of navigation promulgated by the Secretary of the Army. An Army representative is a member of the Joint Board (Exh. 44, p. 6 of Form L-4.)

as petitioner exercising those rights could protect itself only by condemning the upland owner's rights in the stream below the high water mark and paying compensation therefor. This would be equivalent to holding that upland owners have property rights in land under water of navigable streams to which they are entitled to compensation if interferred with in the construction or operation of a federally-licensed power project. This would be contrary to the holdings of this Court in *Twin City* and *Virginia Electric.*

The decision of the New York Court of Appeals in the instant case and the decision by a divided court of the Ninth Circuit in the *Seattle* case are in direct conflict with the holding of four judges of this Court in *Grand River Dam Authority* v. *Grand-Hydro, supra.* This is particularly significant because in the latter case the other five judges of this Court reserved for future determination the question of whether when the United States or a Federal licensee condemns land on a navigable stream for the improvement of commerce the owner of the land is entitled to any value of alleged rights in land under water and upland location value dependent on the flow of the stream. This Court decided the part of the question relating to the United States in *Twin City* and *Virginia Electric.* The part of the question relating to licensees should be resolved in the instant case.

When the United States exercises its dominant servitude over the waters of a navigable stream through a Federal Power Commission licensee which develops the stream for commerce, owners of property condemned by the licensee pursuant to Section 21 of the Federal Power Act are not entitled to any valuation of upland based upon flow of the stream or compensation for rights in land under the water of the stream. A *fortiori,* when the licensee is a nonprofit instrumentality of a state, and when the license was issued not only pursuant to the Federal Power Act but also pursuant to a specific Act of Congress directing the licensee to utilize all the water of a navigable international

stream available to the United States pursuant to an international agreement and the Act required it to pay the United States' share of the cost of works to prevent erosion and required it to make the power available for distribution and use in several states at the lowest rates reasonably possible, the owner of land condemned by such a licensee pursuant to the Federal Power Act for purposes of the project is not entitled to any location value of upland dependent on flow of the stream or value of alleged riparian rights in the stream itself.

A Supreme Court decision in the instant case will be of far-reaching importance and will preclude the reoccurrence of time and resource-consuming disputes.

Conclusion

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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Suite 1800,
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Attorney for Petitioner

SCOTT B. LILLY
LEWIS R. BENNETT
PETER A. GIUNTINI
Of Counsel.

June 13, 1972

APPENDIX A

Judgment, Orders and Opinions Below

Judgment and Memorandum of the Court of Appeals of the State of New York (29 N.Y.2d 790)

COURT OF APPEALS

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 17th day of November in the year of our Lord one thousand nine hundred and seventy-one, before the Judges of said Court.

WITNESS,

The HON. STANLEY H. FULD,
Chief Judge, *Presiding.*

RAYMOND J. CANNON,
Clerk.

REMITTITUR November 17, 1971.
Sup. Ct. No. 389. 71

POWER AUTHORITY OF THE STATE OF NEW YORK,
Appellant,

vs.

ERNEST L. FADEL & ANO., & C.,
Respondents.

BE IT REMEMBERED, That on the 3rd day of September in the year of our Lord one thousand nine hundred and seventy-one, Power Authority of the State of New York, the appellant—in this cause, came here unto the Court of

Judgment and Memorandum of the Court of Appeals of the State of New York (29 N.Y.2d 790)

Judgment, Orders and Opinions Below

Appeals, by Thomas F. Moore, Jr., its attorney, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Supreme Court, Niagara County. And Ernest L. Fadel & ano., & c., the respondents in said cause, afterwards appeared in said Court of Appeals by Phelps, Gray, Mansour & Hewitt, their attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Thomas F. Moore, Jr., of counsel for the appellant, and by Mr. Salem G. Mansour, of counsel for the respondents, and after due deliberation had thereon, did order and adjudged that the judgment herein be and the same hereby is affirmed, with costs, in the following memorandum: We find nothing in plaintiff's license or in the treaty and the legislative and administrative action and procedures underlying it, and certainly no clear authorization there or elsewhere, supportive of plaintiff's contention that the right to exercise the dominant servitude, in favor of the United States, in respect of defendants' water rights, devolved upon it, so as to exempt it from payment of compensation for their taking. (*Federal Power Comm.* v. (*Niagara Mohawk Power Corp.*, 347 U.S. 239, 249; *Henry Ford & Son* v. *Little Falls Fibre Co.*, 280 U.S. 369; *Public Utility Dist. No. 1 of Pend Oreille County* v. *City of Seattle*, 382 F.2d 666.) Our conclusion in this regard renders academic the other issues tendered by the appeal.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to Law.

THEREFORE, it is considered that the said judgment be affirmed, with costs, &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are held by the said

Judgment and Memorandum of the Court of Appeals of the State of New York (29 N.Y.2d 790)

Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, November 17, 1971.

I HEREBY CERTIFY, that the proceeding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON,
Clerk.

[SEAL]

Order of the Court of Appeals Denying Motion for Reargument and Amendment of the Remittitur

COURT OF APPEALS

STATE OF NEW YORK

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Seventeenth day of February A.D. 1972.

PRESENT, HON. STANLEY H. FULD, Chief Judge, presiding.

4 Mo. No. 110

POWER AUTHORITY OF THE STATE OF NEW YORK,
Appellant,

vs.

ERNEST L. FADEL &ano., as Executrix of the Last Will and Testament of EDMUND L. FADEL,
Respondents.

A motion for reargument or, in the alternative for amendment of the remittitur in the above cause to this Court having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as it seeks reargument, be and the same hereby is denied, and it is

ORDERED, that the said motion, insofar as it seeks amendment, be and the same hereby is denied upon the ground that the decision of this Court (29 NY 2d 790) indicates the Federal question necessarily passed upon.

[SEAL]

A copy

BEACON KIMBALL
Deputy Clerk

Decision (Supplementary) Rendered After Trial of Preliminary Issue as to Compensability of Riparian Rights

STATE OF NEW YORK

SUPREME COURT

COUNTY OF NIAGARA

[SAME TITLE]

Trial of preliminary issue in condemnation proceeding. Judgment directed in accordance with decision.

APPEARANCES:

Thomas F. Moore, Jr., New York City (Edward D. Siemer of Buffalo and Stephen D. Finale, of New York City, of counsel), attorney for plaintiff.

Phelps, Gray, Mansour & Hewitt, of Niagara Falls (Salem G. Mansour, of counsel), attorneys for defendants.

DECISION

This condemnation proceeding was instituted by the plaintiff Power Authority of the State of New York, pursuant to the provisions of the Public Authorities Law and the Condemnation Law, for the purpose of acquiring certain real property of the defendants Ernest L. Fadel and Edmund L. Fadel for a public use in connection with the so-called Niagara Power Project. The property involved lies between the south side of Buffalo Avenue and the north shore of the Niagara River, near 63rd Street in the City of Niagara Falls, Niagara County, New York. It is located a short distance west of the north approach to the Grand Island Bridge and fronts on the Niagara River, which in this vicinity flows generally in a westerly direc-

Decision (Supplementary) Rendered After Trial of Preliminary Issue as to Compensability of Riparian Rights

tion. The lands in question are described in this proceeding as Parcels Nos. 1872, 1873 and 1874; Parcel No. 1874 is adjacent to the water's edge of the Niagara River, Parcel No. 1872 abuts Buffalo Avenue and Parcel No. 1873 lies between and contiguous to the other two parcels.

Pursuant to stipulation of the parties, a preliminary issue of title to these parcels was tried before the undersigned without a jury and determined by decision made and filed herein, dated November 9, 1962. That decision directed entry of interlocutory judgment adjudging, among other things, that public use required the condemnation of the three parcels; that the defendants held title to the fee of Parcels Nos. 1872 and 1873 as tenants in common; that the State of New York held title to Parcel 1874, subject to the riparian rights and easements therein held by defendants; and that plaintiff was entitled to take and hold title to Parcels Nos. 1872 and 1873 and to occupy and use Parcel No. 1874 for public use upon making compensation therefor. Judgment was not entered on the decision of November 9, 1962, as the parties were unable to agree to the form and substance thereof, and motions for settlement of the interlocutory judgment were argued before the undersigned on March 15, 1963.

In the argument on the motions, plaintiff took the position that the taking of any riparian rights of the defendants were not compensable for the reason that the property was acquired from defendants for the purpose of aiding and improving navigation and commerce on the Niagara River. Defendants took the opposite position, claiming that their riparian rights could be taken only upon compensating them therefor because their property, including the riparian rights, was not taken nor required nor used by plaintiff for the purposes of navigation and commerce upon the Niagara River. There having been no evidence produced at the earlier trial upon the question of the pur-

Decision (Supplementary) Rendered After Trial of Preliminary Issue as to Compensability of Riparian Rights

pose of the taking and use of defendants' property, upon stipulation of the parties it was ordered that the case be re-opened; that the defendants be permitted to amend their answer to raise the issue of the purpose of taking and use of the subject premises and that the parties be permitted to submit their proofs on this issue for determination by the undersigned as to whether or not any riparian rights taken are compensable.

This second trial has been held, the parties have submitted their respective requests to find and memoranda and briefs on the law and the facts and the issues have been submitted to the Court for its decision, which follows:

By their amended answer, verified April 5, 1963, defendants deny that part of paragraph numbered "4" of plaintiff's amended petition, verified March 11, 1959, which alleges that defendants' property is required by the plaintiff and has been condemned by it for the purpose of or use in the development of navigation and commerce on the Niagara River. Thus is created the precise issue to be decided upon this second trial and the burden of proving its allegation that the taking was in aid of or to promote navigation and commerce on the Niagara River rests upon the plaintiff.

A careful reading and consideration of the evidence produced upon the trial leads this Court to the conclusion that plaintiff has failed to establish by a fair preponderance of the credible evidence that the taking of defendants' property was in aid of navigation or commerce. On the contrary, it appears from the evidence and I find as a fact that the taking of the property in question was for use in connection with the Niagara Power Project, which was not undertaken or licensed for the purpose of improving or aiding navigation or commerce on the Niagara River, but for the primary purpose, as stated in the license (Ex. 44), of developing hydro-electric power.

Decision (Supplementary) Rendered After Trial of Preliminary Issue as to Compensability of Riparian Rights

The Niagara Power Project has no real or substantial relation to navigation or commerce on the Niagara River. Any incidental effect of the Power Project on navigation would be relatively inconsequential, minimal and negligible. Plaintiff emphasizes the fact that the Federal Government, through appropriate Departments and Agencies, has certain powers and rights in relation to this project, because the Niagara River is a navigable river and an international boundary line. This is true, but as far as the Niagara Power Project is concerned, the Federal Government's prime interest in respect to navigation is to properly see to it that nothing is done to interfere with the navigability of the Niagara River, not to promote or improve its navigability. The only direct aid to navigation shown by the evidence which results from the project is the creation of the new marine terminal or dock, some two-thirds of a mile downstream and west of defendants' land. This new terminal, however, was constructed merely to replace a former terminal which had existed near the foot of Hyde Park Boulevard, west of the intake works, and which was destroyed by plaintiff in carrying out its plans for the power project. So in effect, the new terminal was not any new improvement aiding navigation, but a re-location of a navigation facility which existed prior to the undertaking of the power development project by plaintiff. Not over two or three per cent of the estimated one million cubic yards of material dredged from the Niagara River came from the new terminal basin and channel leading from the terminal to the so-called Federal Channel in the River. The balance of the spoil resulted from excavation required in the area of the intake works, which is located approximately one mile west of defendants' property. The dredging was done in the main for the purpose of development of the power project, not for navigation purposes; one condition of the Federal License (Ex. 44) provided that dredged and excavated

Decision (Supplementary) Rendered After Trial of Preliminary Issue as to Compensability of Riparian Rights

material be removed and deposited so as not to interfere with navigation; the license did not contemplate nor require dredging and excavating to promote or aid navigation, except in connection with the replacement terminal above referred to. The many other academic contentions and arguments advanced by plaintiff are deemed irrelevant and not to merit or require discussion.

It seems quite apparent that defendants' lands, including their riparian rights, were taken by plaintiff, not for the purpose of navigation, but for the purposes of providing a spoil area for the deposit of material excavated in development of the hydro-electric power project, as a means of ready and convenient access to lands owned by New York State or some Agency thereof, lying east of the defendants' lands and west of the Grand Island Bridge, for temporary use as a construction road and for a contemplated eventual use as a portion of a planned future site of a highway traffic interchange between the Niagara Parkway, a parkway development authorized under the Niagara Power Project, and highways connecting to the Grand Island Bridges.

Having determined the essential facts, there remains only the application of the law to those facts. The principles of law applicable are too well settled to require the citation of authorities. It is recognized that private riparian rights on a navigable river may be taken or destroyed by a government, to promote navigation or commerce on the river, without payment of compensation. Conversely, it is also well-settled law that riparian rights of an upland owner in and to a navigable international boundary river cannot be taken by any government or agency without just compensation, unless the taking is for the purpose of improving the river for navigation or commerce. It must be concluded that defendants are entitled to be compensated for their riparian rights which have been taken.

Decision (Supplementary) Rendered After Trial of Preliminary Issue as to Compensability of Riparian Rights

Written requests to find, submitted by the parties, have been passed upon and marked by the Court contemporaneously herewith. The proposed findings of fact and conclusions of law which have been marked "Found" are incorporated herein by reference and they, together with the additional findings of the Court hereinabove stated, constitute the decision of this Court, as contemplated by Civil Practice Act, § 440.

The decision previously made herein by this Court, dated November 9, 1962, is adhered to, except that any portion thereof which might be interpreted as a finding that plaintiff acquired defendants' property for the purposes of development of the Niagara River for commerce or navigation on the Niagara River is hereby recalled, withdrawn and vacated.

Accordingly, judgment is directed to be entered to the effect that public use requires the condemnation of Parcels Nos. 1872, 1873 and 1874; that defendants hold title to the fee of Parcels Nos. 1872 and 1873 as tenants in common; that the State of New York holds title to Parcel No. 1874, subject to the riparian rights and easements therein held by defendants, appurtenant and incidental to their ownership of Lots Nos. 1872 and 1873; that plaintiff is entitled to take and hold title to Parcels Nos. 1872 and 1873 and to occupy and use Parcel No. 1874 for the public use upon making compensation therefor; and that the parties hereto, or either of them, may make application to a Special Term of the Supreme Court in the Eighth Judicial District for the appointment of Commissioners of Appraisal to ascertain the compensation to be made to the defendants for their property which is being taken.

Dated August 31, 1963.

ARTHUR ERVIN BLAUVELT
Justice Supreme Court

Plaintiff's Requests to Find Made on Trial of Preliminary Issue as to Compensability of Riparian Rights

STATE OF NEW YORK

SUPREME COURT

COUNTY OF NIAGARA

[SAME TITLE]

FINDINGS OF FACT

The Plaintiff requests the Court to find as follows:

1. That the Niagara falls was being eroded by the action of the Niagara River. (Pgs. 33-4).

"Found"—Aug. 3, 1963—A. E. B.—J. S. C.

2. That continued erosion of Niagara falls would eliminate navigation in the Niagara River and could result in the dropping of the level of Lake Erie. (Pgs. 33-4)

"Found"—Aug. 3, 1963—A. E. B.—J. S. C.

3. That the Federal government in conjunction with the Dominion of Canada had agreed to perform remedial work in the Niagara River to reduce the eroding action of the river. (Pg. 31)

"Found"—Aug. 3, 1963—A. E. B.—J. S. C.

4. That the Legislature of the State of New York directed the Power Authority of the State of New York its political subdivision to proceed in cooperation with proper Canadian authorities and those of the United States with the improvement and development of the Niagara river for the development of commerce and navigation, development of hydro-electric power, and to preserve and enhance the

scenic beauty of the Niagara falls and river. (P. A. L. §§ 1001, 1005)

"Found"—Aug. 3, 1963—A. E. B.—J. S. C.

5. That in 1957 the Congress of the United States authorized and directed its agency, the Federal Power Commission, to issue a license to the Power Authority of the State of New York for the work directed by the Legislature of the State of New York. (Public Law 85-159)

"Found"—Aug. 3, 1963—A. E. B.—J. S. C.

6. That the Federal Power Commission found that the project proposed by the Power Authority of the State of New York in connection with the Niagara River would affect navigable waters of the United States and was best adapted to a comprehensive plan for the development of the Niagara river for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes. (Exh. 44, Pg. 8, paragraph (1), Pg. 11, paragraph (7))

"Found"—Aug. 3, 1963—A. E. B.—J. S. C.

7. That the license issued by the Federal Power Commission to the Power Authority of the State of New York required the Licensee to pay the United States share of the cost of construction of remedial works in the Niagara river pursuant to a treaty between the United States of America and Canada signed February 27, 1950. (Exh. 44, Pg. 14, article 26)

"Found"—Aug. 3, 1963—A. E. B.—J. S. C.

8. That the license issued by the Federal Power Commission to the Power Authority of the State of New York

required the Licensee to construct a terminal for the receipt of water borne commerce and to excavate a channel from existing Federal channels in the river to such terminal. (Exh. 44, Pgs. 14-15, article 30)

"Found"—Aug. 3, 1963—A. E. B.—J. S. C.

9. That the license issued by the Federal Power Commission to the Power Authority of the State of New York required the Licensee to permit control of the use, storage and discharge from storage of waters of the Niagara river by reasonable rules and regulations prescribed by the Secretary of the Army in the interests of navigation. (Exh. 44, Pg. 6, article 13)

"Found"—Aug. 3, 1963—A. E. B.—J. S. C.

10. That prior to the commencement of the project the shore line of the Niagara river in the vicinity of the defendants' property had been eroded and was subject to irregularity reducing the flow of the river and permitting the hanging of ice along the shore. (Exh. 45, 47, Pg. 70)

"Refused"—Aug. 31, 1963—A. E. B.—J. S. C.

11. That as part of the project the shore line of the Niagara river was rebuilt several hundred feet out into the bed of the river from the existing shore line including the shore line in front of the defendants' property. (Pg. 38, 149)

"Found"—Aug. 31, 1963—A. E. B.—J. S. C.

12. That the shore line in the vicinity of defendants' premises was rebuilt in a smooth and continuous line. (Pg. 38)

"Found"—Aug. 31, 1963—A. E. B.—J. S. C.

Plaintiff's Requests to Find Made on Trial of Preliminary Issue as to Compensability of Riparian Rights

13. That the rebuilding of the shore line increased the depth of the water and minimized the hanging of ice along the shore. (Exh. 46, 47, Pg. 70)

"Found"—Aug. 31, 1963—A. E. B.—J. S. C.

14. That the rebuilding of the shore line benefited navigation. (Pg. 70)

"Refused"—Aug. 31, 1963—A. E. B.—J. S. C.

15. That the bottom of the river from the new terminal constructed as part of the project to the existing Federal channels in the river was excavated for the benefit of navigation to the new terminal. (Pgs. 36, 74, Exh. 47)

"Found"—Aug. 31, 1963—A. E. B.—J. S. C.

16. That the bed of the river in the vicinity of the terminal and power intakes and down-stream of the power intakes and terminal was excavated by dredging. (Exh. 47, Pgs. 47-48)

"Found"—Aug. 31, 1963—A. E. B.—J. S. C.

17. That the excavation of the river bottom by dredging provided an enlarged turning basin for vessels using the new terminal. (Pg. 36)

"Refused"—Aug. 31, 1963—A. E. B.—J. S. C.

18. That the excavation of the river bottom by dredging facilitated the movement of ice down the river and over the falls, preventing flooding which had previously occurred upstream. (Pgs. 37, 48)

"Found"—Aug. 31, 1963—A. E. B.—J. S. C.

Plaintiff's Requests to Find Made on Trial of Preliminary Issue as to Compensability of Riparian Rights

19. That the excavation of the river bottom by dredging increased the depth of the river, produced a uniformity of flow, and reduced the velocity of the river. (Pgs. 80, 81)

"Found"—Aug. 31, 1963—A. E. B.—J. S. C.

20. That the excavation of the river bottom by dredging made navigation in the area practical and greatly improved the navigational features of the river in the area. (Pgs. 48, 79, 80, 81, 121, 123, 142)

"Refused"—Aug. 31, 1963—A. E. B.—J. S. C.

21. That the excavation of the river bottom by dredging required the removal of approximately one million cubic yards of earth and rock. (Pg. 50)

"Refused"—Aug. 31, 1963—A. E. B.—J. S. C.

22. That the project plans called for the deposit of excavated material in the bed of the river between the new shore line and the existing shore line and the piling of excess material on uplands in an area bounded on the east by the Grand Island Bridge, on the west by the waterworks of the City of Niagara Falls, on the north by Buffalo Avenue and on the south by the existing shore line of the river. (Pg. 54, Exhs. 46, 48, 49)

"Found"—Aug. 31, 1963—A. E. B.—J. S. C.

23. That the deposit of excavated material in the bed of the river to straighten the shore line was approved by the Army Engineers in accordance with the license. (Pg. 49)

"Found"—Aug. 31, 1963—A. E. B.—J. S. C.

24. That the lands taken from the defendants, being parcels 1872 and 1873, were within the spoil area and were

taken for the purpose of storing excavated material and were used for that purpose. (Pg. 67, 86)

"Found"—Aug. 31, 1963—A. E. B.—J. S. C.

25. That vehicles used to transport the excavated materials by reason of their size and weight could not be used on public thorofares. (Pgs. 101, 129-30)

"Refused"—Aug. 31, 1963—A. E. B.—J. S. C.

26. That the economic disposition of the excavated material required that it be deposited and stored close to the area in which it had been excavated. (Pgs. 92, 93, 96, 102, 128)

"Found"—Aug. 31, 1963—A. E. B.— J. S. C.

27. That the Power Authority of the State of New York built as a part of the project a marine terminal and dock and direct road access to it as required by the license. (Pgs. 35-36)

"Found"—Aug. 31, 1963—A. E. B.— J. S. C.

28. That the dock and terminal constructed by the Power Authority of the State of New York has commercial traffic. (Pgs. 125, 134)

"Found"—Aug. 31, 1963—A. E. B.— J. S. C.

29. That a parkway constructed as part of the project was originally planned and constructed to commence on Buffalo Avenue, west of the defendants' lands. (Exhs. 54, 55, 46, Pgs. 60, 62)

"Found"—Aug. 31, 1963—A. E. B.— J. S. C.

30. That the parkway as proposed and as built was never intended to cross or to touch the defendants' property. (Exhs. 54, 55, 46, Pgs. 60, 62)

"Found"—Aug. 31, 1963—A. E. B.— J. S. C.

Plaintiff's Requests to Find Made on Trial of Preliminary Issue as to Compensability of Riparian Rights

31. That the taking of the defendants' property, being parcels 1872 and 1873, was determined to be necessary to the project by the Power Authority of the State of New York irrespective of the building or non-building of a parkway. (Pgs. 67, 86)

"Found"—Aug. 31, 1963—A. E. B.— J. S. C.

32. That the remedial works in the river, the excavation in the river, the straightening of the shore line, and the building of the terminal and dock were at least in part for the improvement of navigation on the Niagara river.

"Refused"—Aug. 31, 1963—A. E. B.—J. S. C.

33. That in the construction and operation of the project, navigation and commerce were prime considerations and were and are paramount. (Pg. 143, Exhs. 44, Pg. 5, article 11; Exh. 44, Pg. 6, article 13)

"Refused"—Aug. 31, 1963—A. E. B.—J. S. C.

34. That in constructing the Niagara project the Power Authority of the State of New York acted as agent of the State of New York and of the United States of America. (P. A. L. § 1001 et seq. Public Law 85-159, Exh. 44)

"Found"—Aug. 31, 1963 A. E. B.—J. S. C.

Respectfully submitted,

POWER AUTHORITY OF THE STATE OF NEW YORK,
Thomas F. Moore, Jr., *Counsel*
Edward D. Siemer *of Counsel*
Office and Post Office Address:
1918 Liberty Bank Building
Buffalo 2, New York

Plaintiff's Requests to Find Made on Trial of Preliminary Issue as to Compensability of Riparian Rights

STATE OF NEW YORK

SUPREME COURT

COUNTY OF NIAGARA

[SAME TITLE]

CONCLUSIONS OF LAW

The plaintiff requests the Court to make the following conclusions of law:

That government has the dominant power to control and regulate navigable waters in the interest of navigation and commerce without payment of compensation for private riparian rights adversely affected.

"Found"—Aug. 31, 1963—A. E. B.— J. S. C.

Scranton v. *Wheeler*, 179 U. S. 141 (1900); *United States* v. *Grand River Dam Authority*, 363 U. S. 229 (1960); *Slingerland* v. *International Contracting Co.*, 169 N. Y. 60; *Sage* v. *The Mayor*, 154 N. Y. 61.

2. That the powers of the Federal government in connection with navigable international boundary waters are dominant over the powers of the State and that the powers of the State are dominant over the rights and interests of individual property owners in and to the bed and waters of navigable waters.

"Found"—Aug. 31, 1963—A. E. B.— J. S. C.

United States v. *Twin City Power Co.*, 350 U. S. 322 (1955); *United States* v. *Grand River Dam Authority*, *supra*.

Plaintiff's Requests to Find Made on Trial of Preliminary Issue as to Compensability of Riparian Rights

3. The Niagara project is a federally authorized project and plaintiff in acquiring defendants' property is exercising the Federal power of eminent domain.

"Found"—Aug. 31, 1963—A. E. B.— J. S. C.

Federal Power Act, § 21; *Federal Power Commission* v. *Tuscarora Indian Nation*, 362 U. S. 99, 120, 124 (1960); *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 885, 892-894 (C. A. 2d 1958).

4. The dominant power of government extends to the entire bed of a stream to high water mark and the exercise of such power is not an invasion of any private property right for which government must make compensation but is the lawful exercise of a power to which the property has always been subject.

"Refused"—Aug. 31, 1963—A. E. B.—J. S. C.

United States v. *Virginia Electric & Power Co.*, 365 U. S. 624 (1960); *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592, 596-597 (1941).

5. The dominant right of government includes the right to alter or obstruct or even to close a navigable waterway to aid it at another.

"Found"—Aug. 31, 1963—A. E. B.— J. S. C.

United States v. *Commodore Park, Inc.*, 324 U. S. 386 (1945).

6. In the exercise of its dominant power it is for Congress alone to decide whether a particular project, by itself or as part of a more comprehensive scheme, will have such a beneficial effect on the arteries of interstate commerce as to warrant it.

"Refused"—Aug. 31, 1963—A. E. B.—J. S. C.

Plaintiff's Requests to Find Made on Trial of Preliminary Issue as to Compensability of Riparian Rights

Oklahoma v. *Atkinson Co.*, 313 U. S. 508 (1960).

7. Until Congress exercises its dominant power the State through its Legislature has the same right to determine the uses which may be made of the bed and waters of a navigable stream.

"Found"—Aug. 31, 1963—A. E. B.— J. S. C.

Niagara Falls P. Co. v. *Water P. & C. Comm.*, 267 N. Y. 265 at 276.
Green Bay & M. Canal Co. v. *Patten Paper Co.*, 172 U. S. 58 at 81.

8. Whether the resulting benefits to commerce as a result of this particular exercise by Congress of the commerce power outweigh the costs of the undertaking is not the subject of judicial inquiry and this Court may not inquire into the considerations or motives which moved members of Congress to vote for the project.

"Found"—Aug. 31, 1963—A. E. B.—J. S. C.

Oklahoma v. *Atkinson Co., supra; United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53 (1912).

9. Whether a project, for which realty is sought to be condemned, is in aid of one rather than another of enumerated public uses, is not the subject of judicial inquiry.

"Refused"—Aug. 31, 1963—A. E. B.—J. S. C.

United States v. *277.97 acres of Land*, 112 F. Supp. 159 (U. S. D. C. S. D. Cal. N. D. 1953); *Hudson R. Dist. v. F. J. & G. R. Co.*, 249 N. Y. 445 (1928).

10. The necessity or expediency of appropriating any particular property is not the subject of judicial cognizance

Plaintiff's Requests to Find Made on Trial of Preliminary Issue as to Compensability of Riparian Rights

and the trial court lacks authority to review or redetermine the necessity for the acquisition of the defendants' property.

"Refused"—Aug. 31, 1963—A. E. B.—J. S. C.

Berman v. *Parker*, 348 U. S. 26, 35-36; *United States* v. *Mischke*, 285 F. 2d 628 (C. A. 8th 1961).

11. Once a public purpose has been found, whether particular structures are necessary to the completion of a project is not the subject of judicial inquiry.

"Refused"—Aug. 31, 1963—A. E. B.—J. S. C.

United States v. *277.97 Acres of Land, supra; James Everard's Breweries* v. *Day*, 265 U. S. 554, 559 (1923).

12. The fact that an entire project has multiple purposes and that purposes other than navigation or commerce would also be served does not invalidate the exercise of the authority conferred even if those other purposes would not alone have justified an exercise of governmental power or that navigation and commerce may be relatively of lesser importance.

"Refused"—Aug. 31, 1963—A. E. B.—J. S. C.

Oklahoma v. *Atkinson Co., supra*, at pp. 533-534; *United States* v. *Commodore Park, Inc., supra.*

13. That the Niagara Project is a multiple purpose project in aid of navigation and commerce, including the development of hydro-electric power from the energy inherent in the flow of the Niagara River.

"Refused"—Aug. 31, 1963—A. E. B.—J. S. C.

Public Law 85-159; Public Authorities Law §§ 1001, 1005; Plaintiff's Ex. 44.

Plaintiff's Requests to Find Made on Trial of Preliminary Issue as to Compensability of Riparian Rights

14. That defendants are not entitled to any compensation for the loss, abridgement or curtailment of any riparian rights appurtenant to their property.

"Refused"—Aug. 31, 1963—A. E. B.—J. S. C.

United States v. *Commodore Park, Inc., supra; United States* v. *Virginia Electric & Power Co., supra; United States* v. *Twin City Power Co., supra; Matter of City of New York (Jamaica Bay)*, 256 N. Y. 382, 389; *Slingerland* v. *International Contracting Co., supra; Sage* v. *The Mayor, supra; Crill* v. *City of Rome*, 47 How. Pr. 398.

Respectfully submitted,

Power Authority of the State of New York,
Thomas F. Moore, Jr.,
Counsel

Edward D. Siemer, *of Counsel*
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Buffalo 2, New York

Defendants' Requests to Find Made on Trial of Preliminary Issue As To Compensability of Riparian Rights.

STATE OF NEW YORK

SUPREME COURT

COUNTY OF NIAGARA

[SAME TITLE]

The defendants, Ernest L. Fadel and Edmund L. Fadel, respectfully submit the following proposed findings of fact and conclusions of law for adoption by the Court herein:

FINDINGS OF FACT

1. The premises involved in this proceeding were taken by plaintiff in condemnation for the primary purpose of providing a spoils area for the deposit of earth and rock excavated during the construction by it of the Niagara Power Project.

"Found"—Aug. 31, 1963—A. E. B.—J. S. C.

2. That the total amount of excavated materials deposited on and along the shore of defendants' land and land contiguous to it on the east and west between the North Grand Island Bridge and 57th Street in the City of Niagara Falls, New York, was in excess of 1,000,000 cubic yards.

"Found"—Aug. 31, 1963—A. E. B.—J. S. C.

3. That the plaintiff, as part of its project, excavated a portion of the bed of the Niagara River about half a mile west of defendants' property in connection with the provi-

sion of a channel to a dock built by it about three-quarters of a mile west from defendants' property.

"Found"—Aug. 31, 1963—A. E. B.—J. S. C.

4. That the materials removed in connection with the excavation of the channel amounted to 20,000 to 30,000 cubic yards which was deposited somewhere in the spoils area between North Grand Island Bridge and 57th Street along the shore of the Niagara River.

"Found"—Aug. 31, 1963—A. E. B.—J. S. C.

5. That the Federal license issued to the plaintiff and its plans for the Niagara Project included and contemplated the construction upon the spoil area along the Niagara River of a scenic parkway having its easterly terminus at the Grand Island Bridge to be built by the plaintiff in conjunction with other public agencies.

"Found"—Aug. 31, 1963—A. E. B.—J. S. C.

6. That the plans for such parkway contemplated that the defendants' property would eventually be the site of a traffic interchange connecting the Niagara Parkway to the Grand Island Bridge.

"Found"—Aug. 31, 1963—A. E. B.—J. S. C.

7. That at the present time the plaintiff has constructed three incomplete traffic spurs for a traffic interchange upon the property of the defendants, taken by it.

"Found"—Aug. 31, 1963—A. E. B.—J. S. C.

8. That the defendants' property and their riparian rights appurtenant thereto and their easements upon, over

and to Parcel 1874 were not taken by the plaintiff nor required and used by it for the purposes of navigation and commerce upon the Niagara River.

"Found"—Aug. 31, 1963—A. E. B.—J. S. C.

CONCLUSION OF LAW

1. The defendants are entitled to full and just compensation from the plaintiff for the taking by it in condemnation of their riparian rights in Parcel 1874 appurtenant and incidental to the defendants' fee ownership of Parcels 1872 and 1873, the adjoining uplands, which riparian rights include easements of view, right of access to the navigable part of the River, the right to make a landing, wharf or pier for their own use or for the use of the public and all other rights incident thereto and the exclusive right to apply to the State of New York for a grant of the lands under water adjacent to their uplands.

"Found"—Aug. 31, 1963—A. E. B.—J. S. C.

Respectfully submitted,

PHELPS, GRAY, MANSOUR & HEWITT,
Attorneys for Defendants Ernest L. and Edmund L. Fadel.

Decision Rendered After Trial of Preliminary Issue as to Title

STATE OF NEW YORK

SUPREME COURT

COUNTY OF NIAGARA

[SAME TITLE]

Trial of preliminary issue of title in condemnation proceeding.

Judgment directed in accordance with decision.

APPEARANCES:

THOMAS F. MOORE, JR., of New York City
(EDWARD D. SIEMER, of Buffalo, of counsel),
Attorney for plaintiff.

PHELPS, GRAY, MANSOUR & HEWITT, of Niagara Falls
(SALEM G. MANSOUR, of Niagara Falls, of counsel),
Attorneys for defendants.

DECISION

This is a trial by the court without a jury of a preliminary issue of title raised by the pleadings in this condemnation proceeding in respect to parcel designated No. 1874 in the amended petition herein. The trial was held in accordance with the terms of an oral stipulation of the parties by their respective attorneys in open court. Five additional parties were originally also included as co-defendants, namely: Robert Fadel, The Marine Trust Company of Western New York, Sun Oil Company, City of Niagara Falls and County of Niagara. It was stipulated that these five parties—defendant no longer have any interest in this proceeding, that the proceeding be discontinued as against

them, that Ernest L. Fadel and Edmund L. Fadel are the sole remaining defendants and that the title of this condemnation proceeding be amended accordingly and as above set forth.

This condemnation proceeding was commenced by the plaintiff Power Authority of the State of New York, pursuant to the Public Authorities Law and the Condemnation Law, for the purpose of acquiring certain real property of the defendants Ernest L. Fadel and Edmund L. Fadel for a public use in connection with the so-called Niagara Power Project. The property involved lies between the south side of Buffalo Avenue (formerly River Road), near 63rd Street in the City of Niagara Falls, Niagara County, New York, and the Niagara River. It is river front property situate just west of the Grand Island Bridge and is located adjacent to the north shore of the Niagara River which in this vicinity flows generally in a westerly direction. In this condemnation proceeding the lands are described and set forth in the revised appropriation map (Map No. 1400 R-1, Ex. 29) as three separate contiguous parcels, Nos. 1872, 1873 and 1874. Taken together, these three parcels comprise a more or less rectangular tract of land, as shown on the revised appropriation map, with a north line of 109 feet along the southerly boundary line of Buffalo Avenue, a west line of 456.67 feet, an east line of 445.50 feet and a meandering south line of 120 feet along the water's edge at the north shore of the Niagara River. There is no dispute concerning title to parcels Nos. 1872 and 1873, as plaintiff concedes and alleges in its amended petition that the defendants are the owners of those premises. The issue raised by the pleadings is what interest defendants have in parcel No. 1874, which is shown on the revised appropriation map as lying adjacent to the water's edge along the north shore of the Niagara River. This map shows this parcel No. 1874 to be a tract adjacent to the south line of parcel No. 1873 with a north line of

111.48 feet, a west line of 95 feet, an east line of 75 feet and with its south meander line running along the water's edge a distance of 120 feet along the northerly shore of the Niagara River. The area of this parcel No. 1874 is computed to be 7800 square feet or 0.179 acres.

In respect to this parcel No. 1874 the title of which is in dispute, plaintiff alleges that defendants are in possession thereof and claim ownership thereto; that this parcel consists of filled in land entirely within the bed of the Niagara River and is owned by the people of the State of New York in its sovereign capacity, and that the defendants have no right, title or interest therein. Defendants deny these contentions of the plaintiff and claim that they have legal record title in fee to this parcel; that they and their predecessors in title have been in actual possession thereof for upwards of sixty years; and that they as owners of the upland have appurtenant thereto the customary riparian rights, including easements of view and access to the navigable waters of the river.

It was established at the trial that the parcel in dispute is a part of Lot 51 of the Mile Reserve Tract. The Mile Reserve Tract is that strip of land, one mile in width, extending from Lake Ontario to Lake Erie and lying parallel and adjacent to the east shore of the Niagara River, the full ownership of which strip of land was reserved to the State of New York in its soverign and proprietary capacity by the terms of the Treaty of Hartford, entered into between New York and Massachusetts on December 16, 1786. This Mile Reserve is described as lying on the east side of the straits or Niagara River, which river flows in a general northerly direction from Lake Erie to Lake Ontario. However, in the vicinity of the land in question, the Niagara River as it winds around Grand Island flows in a general westerly direction and Lot 51 of the Mile Reserve lies to the north of the Niagara River. Pursuant to legislative direction, in 1803 the Sur-

veyor General of the State of New York made a survey of the Mile Reserve Tract and established the Mile Reserve Line one mile distant from and parallel to the east (in our case north) shore of the Niagara River. This Mile Reserve Line is now the center line of Pine Avenue in the City of Niagara Falls. The location of this Mile Reserve Line was agreed to by the Holland Land Company and the State of New York as the division line between lands of the State of New York and the company which owned the lands to the east (north) of the Mile Reserve. According to the survey of 1803, Lot 51 of the Mile Reserve Tract was laid out as extending southerly from the Mile Reserve Line to the Niagara River, the west line of said lot being 80 chains in length and the east line thereof measuring 81.5 chains.

Lot 51 of the Mile Reserve was granted by Letters Patent from the State of New York to one David Stoner on November 16, 1816, being described therein as:

> "All that certain piece or parcel of land situate in the county of Niagara and distinguished as Lot Number 51 of the unappropriated lands lying along the easterly side of the Niagara River as the same lot has been surveyed and is described in the field book and map of said Lands filed in our Secretary's Office containing one hundred and sixty one acres."

The Niagara River is a navigable river in fact and in law and an international boundary line between the United States of America and the Dominion of Canada and as such the title to lands under the river's waters up to mean high water mark is in the State of New York. The grant to Stoner by the Letters Patent in 1816 did not convey to him the title to any of the land under the waters of the Niagara River.

Following several mesne conveyances, title to that part of Lot 51 which includes the parcel in dispute became

vested in one Louis F. Mayle in 1887 by deed of conveyance which described the southerly boundary line thereof as running "easterly along said Niagara River." From evidence produced at the trial, it was conclusively proven to the satisfaction of this Court that between the time of the original survey in 1803 and the deed to Mayle in 1887 the northerly shore line of the Niagara River had been appreciably moving farther north, which of necessity shortened the distance from the Mile Reserve Line to the Niagara River. It seems fair to infer that the encroachment of the waters of the river along its north bank on the adjoining uplands over the years had gradually worn away and eroded the land and had moved the mean high water mark of the river and the northerly shoreline thereof north of its 1803 location. This conclusion becomes readily understandable when one considers the fact that the level of the Niagara River varies from seven to eight feet in elevation, dependent upon several factors including seasonal and climatic conditions. It is a well-settled rule of law that where a navigable river gradually encroaches upon the land along its shore and causes erosion thereof, the owner of the eroded uplands loses title thereto and the title of the eroded lands returns to the ownership of the State. (Matter of City of Buffalo, 206 N. Y. 316; Nasha Holding Corp. *v.* Ridge Building Corp., 221 App. Div. 238.) It follows that in 1887 Mayle, who was defendants' predecessor in title, obtained title only to the north shore of the Niagara River as it then existed.

On May 15, 1890, as the result of an application by Louis F. Mayle to the State Land Commissioners, he was granted by Letters Patent of the State of New York lands underwater lying adjacent to and south of his uplands extending from mean high water mark on the north side of the Niagara River southerly into the river a distance at an angle of 3.03 chains (199.98 ft.). The location of the southerly line of this underwater grant marks the

southernmost boundary of lands to which the defendants have title and is determinative of the preliminary issue in this proceeding. It is apparent that following the grant of lands under water in 1890, defendants' predecessors in title filled in not only the area covered by the Letters Patent of 1890 but a considerable area out and into the river and south of the southerly line of the grant of under water land to Mayle, and that Parcel No. 1874 with which we are concerned consists of filled in land south of the south line of the Mayle grant of 1890. The owner of uplands along a navigable river may not extend his title by filling in lands under water along and beyond the foreshore. To vest title by accretion, the accretion must take place through the operation of natural causes such as the ordinary action of the waters of the river. This doctrine of accretion does not apply to lands filled in by riparian owners. (*Tiffany* v. *Town of Oyster Bay*, 234 N. Y. 15; *Saunders* v. *N. Y. C. & H. R. R. R. Co.*, 144 N. Y. 75.) Payment by the defendants of taxes assessed upon the filled in property did not operate to vest title to the filled in lands in the defendants. (*City of Mt. Vernon* v. *N. Y., N. H. & H. R. R. Co.*, 232 N. Y. 309.)

Plaintiff proved by more than the fair preponderance of the credible evidence required that the north line of Parcel 1874 coincides with the southerly line of the 1890 under water grant to Mayle. There being no record or evidence of any later grant by the State of New York of lands south of this north line of Parcel 1874, it must be concluded that the State of New York and not the defendants have the legal title to the fee of Parcel 1874.

It should be noted that the defendants, in support of their contention that Parcel #1874 is entirely north of the south line of the 1890 grant to Mayle, offered evidence which they claim showed that the length of the original side lines of Lot 51 exceeded the 80 chains on the west and 81.5 chains

on the east as surveyed by the Surveyor General in 1803. Defendants, through their surveyor witness Keller, claim that because the present measured distance of the north line of Lot 51 exceeds the record title distance of that line as of 1803 by 42.95 feet, a proportionate surplus should be added to the west and east lines of Lot 51. This is urged because of an engineering and surveying practice sometimes adopted which is based upon an assumption that if there is an error in measurement in the distance of one line that the error should be proportionately applied to the other lines of the same survey. This theory is unacceptable to this Court in this particular case as it would require an assumption of a fact not proven which would be inconsistent with and repugnant to many proven facts well-documented and which lead the court to the conclusion that the east and west lines of Lot 51 were correctly measured and recorded in 1803 as being 81.5 chains and 80 chains, respectively.

The alternative contention of defendants that they have acquired title to Parcel 1874 by adverse possession may not be sustained. Title to lands under the waters of a navigable river cannot be acquired by adverse possession as against the State. (*Hinkley* v. *State of New York*, 234 N. Y. 309.) Land originally under water is treated as land under water even after it is filled. (*City of New York* v. *Wilson & Co.*, 278 N. Y. 86.)

Arguments advanced by defendants to the effect that either Section 34 or Section 31 of the Civil Practice Act is a bar to the claim of plaintiff must be overruled. These statutes of limitation are not available to defendants in this proceeding. The fifteen years limitation of C. P. A. § 34, does not apply as plaintiff's grantor (State of New York) has been seized of the legal title to the premises in question continuously from at least the time of the Treaty of Hartford in 1786 up to and including this year of 1962. There is considerable question as to whether or not C. P. A.

§ 31, could in any event be available to defendants under the circumstances of this instant case. However, it is not necessary to answer that question at this time as the forty years limitation of time referred to in Section 31 has not elapsed. At least as late as July 22, 1925, which was only thirty-four years prior to the commencement of this instant proceeding, John W. Broderick, defendants' predecessor in title, made claim that his title extended southerly only to the south line of the 1890 Mayle grant of lands under water; his application for grant of lands under water, including what is now Parcel #1874, was disallowed. Thus we find that the forty years limitation of time referred to in Section 31 of the Civil Practice Act has not expired and therefore that section is inapplicable in any event.

We have determined that the legal title of Parcel No. 1874 is in the State of New York and it appears that the plaintiff is entitled to the ocupation and use thereof. (Public Authorities Law, § 1008.) There remains the question of whether or not defendants, not having the legal title to this parcel, have any right, title or interest in Parcel 1874 which must be acquired by plaintiff in this condemnation proceeding. This question must be answered in the affirmative.

The deeds of conveyance of Parcels Nos. 1872 and 1873 to defendants show the southerly boundary of the lands of which title was conveyed to be "the southerly line of lands granted by the People of the State of New York to Louis F. Mayle by Letters Patent dated May 15, 1890 • • •". Following the description of those lands, the deeds recite:

> "TOGETHER with all the right, title and interest of the parties of the first part in and to all land and lands under water lying south of the premises herein described and between prolongations southerly of the easterly and westerly boundary lines of said premises; • • •

Decision Rendered After Trial of Preliminary Issue as to Title

> TOGETHER with the appurtenances and all the estate and rights of the parties of the first part in and to said premises, * * * "

Defendants obtained by inheritance from their mother Negebe L. Fadel, who died intestate, and by quit-claim deed from their four brothers and sisters title to Parcels No. 1872 and 1873 as tenants in common, together with the customary riparian rights in Parcel No. 1874, appurtenant and incidental to the ownership of the uplands. These riparian rights include easements of view and right of access to the navigable part of the river, the right to make a landing, wharf or pier for their own use or for the use of the public, and all other rights incident thereto, and the exclusive right under Public Lands Law, § 75, subdivision 7, to apply to the State of New York for a grant of the lands under water adjacent to their uplands. (*City of New York* v. *Wilson & Co., supra*, 278 N. Y. 86; *Matter of City of New York (Jamaica Bay)*, 256 N. Y. 382; *Town of Brookhaven* v. *Smith*, 188 N. Y. 74.) Defendants are entitled to be justly compensated for the taking of their riparian rights and easements in Parcel 1874, in addition to the value of the property included in Parcels Nos. 1872 and 1873. (*Crance* v. *State of New York*, 309 N. Y. 690, affirming without opinion 205 Misc. 590.)

Written requests to find have been submitted by the parties and passed upon and marked by the Court contemporaneously herewith. The proposed findings of fact and conclusions of law which have been marked "Found" are incorporated herein by reference with the same force and effect as if set forth herein at length, and they, together with the additional findings of the Court hereinabove stated, constitute the decision of this court, as contemplated by Civil Practice Act, § 440.

Accordingly, judgment is directed to be entered to the effect that public use required the condemnation of Parcels

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1872, 1873 and 1874; that the defendants hold title to the fee of Parcels Nos. 1872 and 1873 as tenants in common; that the State of New York holds title to Parcel No. 1874, subject to the riparian rights and easements therein held by defendants; that plaintiff is entitled to take and hold title to Parcels Nos. 1872 and 1873 and to occupy and use Parcel 1874 for the public use specified in the amended petition herein upon making compensation therefor; and that the parties, or either of them, may make application to a special term of the Supreme Court in the Eighth Judicial District for the appointment of Commissioners of Appraisal to ascertain the compensation to be made to the defendants for their property which is being taken.

Dated, November 9, 1962

ARTHUR ERVIN BLAUVELT
Justice Supreme Court.

Plaintiff's Requests to Find Made on Trial of Preliminary Issue as to Title

STATE OF NEW YORK

SUPREME COURT

COUNTY OF NIAGARA

[SAME TITLE]

The Petitioner requests the Court to find as follows:

FINDINGS OF FACT

1. By the Treaty of Hartford between the Commonwealth of Massachusetts and the State of New York, dated December 16, 1786, the State of New York was determined to be the holder of the sovereign and proprietary rights to a parcel of land lying on the east side of the straits connecting Lakes Erie and Ontario, being one mile distant from and parallel to the said Straits (now known as the Niagara River) (Exh. 1).

"Found"—A. E. B.—J. S. C.

2. By Chapter 73 of the Laws of 1798 of the State of New York, the Surveyor General of the State of New York was authorized and directed to establish the boundaries of the lands belonging to the people of the State of New York adjoining the Niagara River to be established with the consent of the proprietors of the lands adjoining the same to the east (Exh. 2).

"Found"—A. E. B.—J. S. C.

3. That pursuant to the direction of the Legislature, the Surveyor General of the State of New York surveyed the lands of the State lying to the east of the Niagara River,

made a map thereof, and in 1803 entered into an agreement with the Holland Land Company, the owner of lands adjoining on the east thereof, establishing the easterly boundary line of the lands owned by the State of New York (Exh. 7).

"Found"—A. E. B.—J. S. C.

4. That the Surveyor General of the State of New York by Jos. Annin, Deputy Surveyor, laid out the lands of the State of New York adjoining the Niagara River on the east in numbered lots and surveyed the side lines of such lots (Exh. 8 and 9).

"Found"—A. E. B.—J. S. C.

5. That the field notes of Jos. Annin, Deputy Surveyor of the State of New York, made in 1803, show that by an actual measured survey the west line of lot numbered 51 of the Mile Reserve Tract was 80 chains from the Mile Reserve line to the Niagara River, and that the east line of such lot was 81.5 chains from the Mile Reserve line to the Niagara River and that the said lot contained 161 acres (Exh. 9).

"Found"—A. E. B.—J. S. C.

6. That on November 16, 1816, the State of New York conveyed to David Stoner Mile Reserve lot No. 51 containing 161 acres as the same lot has been surveyed and is described in the field book and map of said lands filed in the Office of the Secretary of the State of New York (Exh. 10).

"Found"—A. E. B.—J. S. C.

7. That the field book and map referred to in the conveyance to David Stoner of Mile Reserve lot No. 51 are the

field notes of Jos. Annin, Deputy Surveyor of the State of New York, dated 1803, and the map by Jos. Annin, Deputy Surveyor, being map #420 (formerly map #77) of the Mile Reserve Niagara tract (Exhs. 8 and 9).

"Found"—A. E. B.—J. S. C.

8. That a map by Tobias Witmer, Surveyor, made in 1854 from actual surveys and authentic records shows the east line of lot 51, Mile Reserve tract, to be 81.5 chains from the Mile Reserve line to the Niagara River, and the west line of such lot to be 80 chains from the Mile Reserve line to the Niagara River, and that the north line of such lot, the Mile Reserve line, had become the center line of Mile Line Road (Exh. 12).

"Found"—A. E. B.—J. S. C.

9. That Mile Line Road is now known as Pine Avenue in the City of Niagara Falls.

"Found"—A. E. B.—J. S. C.

10. That by resolution of the Board of Supervisors of Niagara County in the year 1856, David E. Mix, Special Clerk of the Board of Supervisors, had a map prepared of the Niagara River tract which map showed lot 51 as conveyed to David Stoner as having a measurement on the east side line from the Mile Reserve Line to the waters of the Niagara River of 81.5 chains, and having a measurement on the west side line from the Mile Reserve line to the waters of the Niagara River of 80 chains (Exhs. 21, 21a, and 22).

"Found"—A. E. B.—J. S. C.

11. That the field notes of C. F. Witmer, Surveyor, show that by actual measured survey on September 2, 1856 made

for one Walsh, and on an actual measured resurvey in October, 1867 for H. C. Tucker, Witmer found the east line of Mile Reserve lot 51 to be 81 chains 12 links from the Mile Reserve line to the waters of the Niagara River, and the west line of such lot to be 80 chains from the Mile Reserve Line to the waters of the Niagara River (Exh. 14).

"Found"—A. E. B.—J. S. C.

12. That C. F. Witmer, Surveyor, by actual measured survey for Henry C. Jewett on June 13 and 14 and September 4 and 5, 1872, located the shore line of the Niagara River in relation to the Erie Railroad and the New York Central Railroad and River Road, in lot 51 of the Mile Reserve tract, north of the shore line as located by him in 1856 (Exhs. 15, 14 and 36).

"Found"—A. E. B.—J. S. C.

13. That on the 25th day of March, 1872, the Highway Commissioners of the Town of Niagara, County of Niagara, dedicated a 4-rod wide road of which the center line was the Mile Reserve line, which road was known as the Mile Line Highway and is now known as Pine Avenue in the City of Niagara Falls and the Village of LaSalle (Exh. 16), (Exh. 15).

"Found"—A. E. B.—J. S. C.

14. In 1883, C. F. Witmer found the shore line of the Niagara River had receded north over 15 feet from where he had found the same shore line in 1872 (Exh. 36).

"Refused"—A. E. B.—J. S. C.

15. On July 11, 1887, Clara W. Tucker, successor to a portion of the lands conveyed by the State to Stoner, being lot 51, conveyed to Louis F. Mayles a portion of Mile

Reserve lot 51 from the Mile Reserve line to the waters of the Niagara River, with a distance on the west line of 78.51 chains (5,181.66 feet) from the Mile Reserve line to the waters of the Niagara River (Exh. 17 and 19).

"Found"—A. E. B.—J. S. C.

16. That the west line of lands conveyed from Tucker to Mayles July 11, 1887, running from the Mile Reserve line to the waters of the Niagara River was 98.34 feet shorter than the west line of lot 51 of the Mile Reserve tract as surveyed by Annin and conveyed by the State of New York to Stoner (Exh. 19).

"Found"—A. E. B.—J. S. C.

17. That on September 1, 1887, Clara W. Tucker, successor in title to Stoner of a portion of Mile Reserve lot 51, conveyed to Louis F. Mayle, predecessor in title to lands conveyed to the defendants, a portion of Mile Reserve lot 51, bounded on the south by the Niagara River (Exhs. 18 and 19).

"Refused"—A. E. B.—J. S. C.

18. That the shore line of the Niagara River as established by the conveyance from Tucker to Mayle dated September 1, 1887, at its most southerly point was more than 54 feet north of the shore line of the Niagara River as established by Annin in 1803 (Exhs. 18, 19, 36 and 9).

"Refused"—A. E. B.—J. S. C.

19. That in July, 1904, Walter Jones, Civil Engineer, surveyed the conveyances from Tucker to Mayle, finding the west line of such conveyance from the Mile Reserve line to the waters of the Niagara River to be 5,181.66 feet, and the east line of the Mayle conveyances from the center line

of River Road to the waters of the Niagara River to be 227.5 feet, and the west line of such conveyances from the center line of River Road to the waters of the Niagara River to be 206 feet (Exh. 20).

"Found"—A. E. B.—J. S. C.

20. That the conveyances from Tucker to Mayle established the shore line of the Niagara River at a point north of the shore line of the Niagara River as established in the conveyance from the State of New York to Stoner (Exhs. 20 and 36).

"Found"—A. E. B.—J. S. C.

21. That on August 21, 1889, Louis F. Mayle, predecessor in title to the defendants, made application to the Commissioners of the Land Office of the State of New York for a grant of land under the waters of the Niagara River and extending into the waters of the Niagara River 3 chains and 3 links on the east and west lines of the lands applied for (Exh. 23).

"Found"—A. E. B.—J. S. C.

22. That Louis F. Mayle, in making an application for a land grant under the waters of the Niagara River swore in an affidavit that the water of the Niagara River is continuously encroaching upon the adjoining uplands and wearing the same away, and that a portion of the land applied for was formerly part of the adjoining uplands. Also that the water in front of the uplands is very shallow and that the same facts were sworn to by the Supervisor and the Town Clerk of the Town of Niagara (Exh. 23).

"Found"—A. E. B.—J. S. C.

23. That the map attached to the application of Louis F. Mayle for an underwater grant in the year 1889 showed

the depth of the water over the lands applied for to the Land Commissioners of the State of New York to be from 12 to 16 inches in depth (Exh. 23).

"Found"—A. E. B.—J. S. C.

24. That Louis F. Mayle made application to the Land Commissioners of the State of New York to amend his petition for a grant of land under the waters of the Niagara River, to have the grant run from the mean high water mark instead of the mean low water mark as originally applied for (Exh. 23a).

"Found"—A. E. B.—J. S. C.

25. That on the 15th day of May, 1890, the State of New York conveyed to Louis F. Mayle a parcel of land under the waters of the Niagara River in front of and adjacent to Mayle's uplands, beginning at mean high water mark on the Niagara River and extending into the River at an angle 3 chains and 3 links, containing 3.71 acres of land under water (Exh. 23b).

"Found"—A. E. B.—J. S. C.

26. That the waters of the Niagara River had eroded the north shore line of the River in front of the premises conveyed by Tucker to Mayle and that the north line of the grant of lands under water by the State to Mehle was north of the north shore line of the Niagara River as it existed when the State made the original grant of lot 51 to Stoner (Exhs. 23, 23b, 36).

"Found"—A. E. B.—J. S. C.

27. That a map showing the grants of land under water made by the Commissioners of Land Office of the State of New York, prepared by E. A. Bond, State Engineer and

Surveyor, in 1904, and an official record of the State of New York locates the southerly line of the Mayle grant as the north line of parcel 1874 involved in this proceeding (Exhs. 24, 24a).

"Found"—A. E. B.—J. S. C.

28. On September 4, 1890 one Frederick W. Wallace, owner of land adjoining the lands conveyed by Tucker to Mayle on the east thereof, made an application for a grant of land under water to the Commissioners of the Land Office of the State of New York and swore as part of the application that the said land is covered for the most part by very shallow water, and submitted as a part of such application the affidavit of Hazard H. Sheldon, Supervisor of the Town of Niagara, and James F. Murphy, Town Clerk of the Town of Niagara, to the same effect (Exh. 25).

"Found"—A. E. B.—J. S. C.

29. That submitted with the application for a land grant was a survey made for the applicant, Frederick W. Wallace, in the year 1890, by W. C. Johnson, Civil Engineer, showing the distance on Wallace's west line, which was Mayle's east line, from the Mile Reserve line to the Niagara River of 5,296.74 ft (Exh. 25).

"Found"—A. E. B.—J. S. C.

30. That on the 4th day of October, 1890, the State of New York conveyed to Frederick W. Wallace a parcel of land under the waters of the Niagara River in front of and adjacent to his uplands in accordance with his application and the survey submitted in connection therewith (Exh. 25a).

"Found"—A. E. B.—J. S. C.

Plaintiff's Requests to Find Made on Trial of Preliminary Issue as to Title

31. That on April 19, 1926 the Barge Canal Engineers Office of the State of New York surveyed the east line of the grant from the State of New York to Frederick W. Wallace and determined that the shore line of the Niagara River at that date, at its intersection with the east line of the lands of Frederick W. Wallace, was distant 5,382.52 ft. south of the center line of the Niagara Falls Boulevard, being the Mile Reserve line, and that such intersection at such time was 237 ft. south of the 1925 base line established by the State Engineers in River Road, also known as Buffalo Avenue (Exh. 37).

"Found"—A. E. B.—J. S. C.

32. In 1907 a map was made for the Village of LaSalle by Bush & Percival, Engineers, which map was filed on September 23, 1910, in the Niagara County Clerk's Office which map shows the premises conveyed by Tucker to Mayle and gives a distance from the south line of River Road to the shore line of the Niagara River on the west line of such conveyance of 180 ft., and also shows that as of that date the east line of Mile Reserve lot 51 from the Mile Reserve line to the waters of the Niagara River to be 5,329.1 feet (Exhs. 26, 26a, 26b and 36).

"Found"—A. E. B.—J. S. C.

33. That on November 26, 1917, Harry C. Clemenger and Mabel Clemenger, his wife, conveyed to Niagasalle, Inc., defendants' predecessor in title, lands of which defendants' lands were a portion, by the same description used in the conveyance from Tucker to Mayle, together with the additional lands as described in the grant from the State of New York to Mayle (Exh. 27).

"Found"—A. E. B.—J. S. C.

Plaintiff's Requests to Find Made on Trial of Preliminary Issue as to Title

34. That on July 22, 1925, John W. Broderick and Nancy M. Broderick, grantors of defendants' lands to defendants, made application to the Commissioners of the Land Office of the State of New York for a grant of lands under water by which application and the maps annexed thereto the said Brodericks located the southeast corner of the Mayle grant as being 406.22 ft. southerly from the south line of Buffalo Avenue which corresponds with the same location of the same corner as shown in the conveyance from Tucker to Mayle, together with land grant from the State of New York to Mayle (Exhs. 31, 32, 32a and 36).

"Found"—A. E. B.—J. S. C.

35. That the application of John W. Broderick and Nancy M. Broderick to the Land Commissioners dated July 22, 1925, and the maps submitted therewith, show fill extending into the waters of the Niagara River south of the South line of the grant from the State of New York to Mayle (Exhs. 31, 32 and 32a).

"Found"—A. E. B.—J. S. C.

36. That no grant of lands was made by the State of New York to John W. and Nancy M. Broderick, or to any other persons, as a result of the application by John W. Broderick and Nancy M. Broderick for an under water grant of lands south of the grant from the State of New York to Mayle in the area designated as parcel 1874 in these proceedings (Exhs. 33 and 36).

"Found"—A. E. B.—J. S. C.

37. That on May 11, 1934, John W. Broderick and Nancy M. Broderick, predecessors in title to the defendants, conveyed to Niagara Frontier Bridge Commission premises immediately adjoining defendants premises and on the east

thereof, by which conveyance and a survey filed in connection therewith, the south line of the grant by the State of New York to Louis F. Mayle at the southeast corner of defendants' lands was established as being 401.44 ft. south of the south line of Buffalo Avenue, and that such point is the northeast corner of parcel 1874 in these proceedings (Exhs. 34, 35a and 36).

"Found"—A. E. B.—J. S. C.

38. That the conveyance of May 11, 1934 from John W. Broderick and Nancy M. Broderick and the survey filed in connection therewith show that the bed of the Niagara River had been filled in to a considerable extent south of the south line of the grant from the State of New York to Mayle (Exhs. 34, 35a and 36).

"Found"—A. E. B.—J. S. C.

39. That a survey made by John H. Keller, Surveyor, dated March, 1945, revised May 25, 1945, approved by John W. Broderick and Nancy M. Broderick and filed in the Niagara County Clerk's office on July 24, 1945, shows the south line of the Mayle grant at its intersection with the east line of the defendants lands to be 401.44 ft. from the south line of Buffalo Avenue which is the northeast corner of Parcel 1874 in these proceedings (Exhs. 41, 36 and C).

"Found"—A. E. B.—J. S. C.

40. That the conveyance from John W. Broderick and Nancy M. Broderick to Leo H. Fadel and Negebe L. Fadel, his wife, dated the 24th day of October, 1945 and recorded in the office of the Clerk of Niagara County on the 1st of November, 1945 in Liber 796 of Deeds at page 180, and the conveyance from Lucille A. Fadel Khoury, Mitchell Fadel, Amel J. Fadel and Elaine M. Klejdys, distributees of Leo

H. Fadel and Negebe L. Fadel to the defendants Edmund L. Fadel and Ernest L. Fadel, dated the 11th day of June, 1958, and recorded in the office of the Clerk of Niagara County on the 10th day of July, 1958 in Liber 1291 of Deeds at page 242, convey lands from the south line of Buffalo Avenue to the south line of the grant from the State of New York to Mayle recorded in the Niagara County Clerk's office on May 23, 1890, in Liber 198 of Deeds at page 416 (Exhs. 28, 30 and C).

"Found"—A. E. B.—J. S. C.

41. That the south line of the Mayle grant, being the south line of the conveyance to the defendants is the south line of parcel 1873 and the north line of parcel 1874 in these proceedings (Exhs. 36 and C).

"Found"—A. E. B.—J. S. C.

42. That no proof has been submitted of the conveyance to the defendants of any title to lands lying to the south of the north line of parcel 1874 in these proceedings.

"Found"—A. E. B.—J. S. C.

43. That the water level of the Niagara River varies with climatic conditions.

"Found"—A. E. B.—J. S. C.

44. That the level of the Niagara River has been lowered by diversion of water from the Great Lakes and the Niagara River.

"Found"—A. E. B.—J. S. C.

45. That the natural river bed of the Niagara River has been filled in south of the south line of the defendants premises (Exhs. 36 and C).

"Found"—A. E. B.—J. S. C.

Plaintiff's Requests to Find Made on Trial of Preliminary Issue as to Title

46. That the claim of the defendants to title to parcel 1874 in these proceedings is based solely on the claim that the measured distance of the north line of lot 51 of the Mile Reserve is longer than the record title distance of such line and that if the same proportionate difference were applied to the east and west lines of such lot that they also would be longer than the record title distance (Exhs. H and I).

"Refused"—A. E. B.—J. S. C.

47. That the west line of lot 51 is the east line of lot 50. That defendants' proof is to the effect that the measured distance of the north line of lot 50 of the Mile Reserve is shorter than the record title distance of such line (Exh. I).

"Found"—A. E. B.—J. S. C.

48. That no proof has been submitted as to any open adverse or hostile possession of parcel 1874 in these proceedings by the defendants or their predecessors in title.

"Refused"—A. E. B.—J. S. C.

Conclusions of Law

1. The State of New York owned the bed of the Niagara River and for one mile to the north of its north shore line (*Niagara Falls Power Co.*, v. *Duryea*, 185 Misc. 696 at 698; *Strawberry Island Co.* v. *Cowles*, 79 Misc. 279 at 283).

"Found"—A. E. B.—J. S. C.

2. Parcel 1874 of land as designated in these proceedings consists of land filled in the original bed of the Niagara River which raises a presumption that title is in the State of New York and places the burden of proving to the contrary on the defendants (*People* v. *Foote*, 242 A. D. 162 at 174, appeal dismissed 273 N. Y. 630, cert. denied 302 U. S. 760; Matter of City of New York, 127 Misc. 710 at 712).

"Found"—A. E. B.—J. S. C.

Plaintiff's Requests to Find Made on Trial of Preliminary Issue as to Title

3. The Niagara River is a navigable river in law and in fact and an international boundary line and as such the title to the bed of the river is in the State of New York (Matter of Commissioners State Reservation, 37 Hun 537 at 547, appeal denied 102 N. Y. 734).

"Found"—A. E. B.—J. S. C.

4. A grant of lands from the State which runs to and along the Niagara River does not convey any lands under water (Matter of Commissioners State Reservation, 37 Hun 537, appeal denied 102 N. Y. 734).

"Found"—A. E. B.—J. S. C.

5. Land filled in the bed of the Niagara River continues its character as land under water (*City of New York* v. *Wilson & Co.*, 278 N. Y. 86 at 97).

"Found"—A. E. B.—J. S. C.

6. A grant of lands from a sovereign to a subject is to be strictly construed against the subject, and this rule is applied with more vigor where the subject makes application for the grant (*People* v. *Foote*, 242 A. D. 162 at 168, appeal dismissed 273 N. Y. 630, cert. denied 302 U. S. 760).

"Found"—A. E. B.—J. S. C.

7. In determining the extent and the boundaries of lands granted by patents issued by the Land Office, the courts take into account statements made in the application, affidavits of surveyors submitted with the application, the minutes and resolutions of the Land Board, and reports of the State surveyors or other State officials in connection with the application (*Bardas* v. *Herman*, 144 A. D. 772 at 776-778, aff'd. 207 N. Y. 745; *People* v. *Steeplechase Park Co.*, 218 N. Y. 459 at 468).

"Found"—A. E. B.—J. S. C.

Plaintiff's Requests to Find Made on Trial of Preliminary Issue as to Title

8. A patent granted which conveys less title than the grantee originally claimed, limits grantees title to the extent of the patent, and the grantee and his successors in interest are estopped from claiming beyond such grant (*People* v. *Foote, supra,* at 168).

"Found"—A. E. B.—J. S. C.

9. An adjacent owner cannot acquire title to land under water by filling the bed of the Niagara River (*Hinkley* v. *State of New York,* 234 N. Y. 309 at 319; Matter of Commissioners State Reservation, 37 Hun 537 at 551; *Burbank et al* v. *Fay et al,* 65 N. Y. 57 at 71; *City of New York* v. *Wilson & Co.,* 278 N. Y. 86 at 97).

"Found"—A. E. B.—J. S. C.

10. The bed of the Niagara River and its waters are inalienable (Matter of Commissioners State Reservation, 37 Hun 537; *Burbank et al* v. *Fay et al,* 65 N. Y. 57 at 71; *City of New York* v. *Wilson & Co.,* 278 N. Y. 86 at 97).

"Refused"—A. E. B.—J. S. C.

11. By statute since March 20, 1951 the bed of the Niagara River and its waters have been inalienable (Section 1001, Public Authorities Law).

"Refused"—A. E. B.—J. S. C.

12. All of the rights of the State of New York in the Niagara River and its bed, whether proprietary or sovereign, have been vested in the Power Authority of the State of New York (Sections 1008 and 1014, Public Authorities Law).

"Refused"—A. E. B.—J. S. C.

13. Defendants could not acquire title to parcel 1874 by adverse possession (*Hinkley* v. *State of New York,* 234 N. Y. 309 at 319; Matter of Commissioners State Reservation, 37 Hun 537 at 551; *Burbank et al* v. *Fay et al,* 65 N. Y.

57 at 71; *City of New York* v. *Wilson & Co.*, 278 N. Y. 86 at 97).

"Found"—A. E. B.—J. S. C.

14. Defendants did not acquire title to parcel 1874 by adverse possession.

"Found"—A. E. B.—J. S. C.

15. Defendants have no right, title or interest in or to land designated as parcel 1874 in these proceedings.

"Refused"—A. E. B.—J. S. C.

16. Defendants have no right, title or interest in or to lands under water south of parcel 1873 as designated in these proceedings, or in or to the waters of the Niagara River.

"Refused"—A. E. B.—J. S. C.

17. Title to lands designated as parcel 1874 in these proceedings is in the plaintiff, Power Authority of the State of New York.

"Refused"—A. E. B.—J. S. C.

Respectfully submitted,

THOMAS F. MOORE, JR., ESQ.,
Attorney for Power Authority
of the State of New York,

EDWARD D. SIEMER of Counsel,
Office and Post Office Address:
1918 Liberty Bank Building,
Buffalo 2, New York.

Dated, November 9th, 1962.

ARTHUR ERVIN BLAUVELT
Justice Supreme Court

Defendants' Request to Find Made on Trial of Preliminary Issue as to Title

STATE OF NEW YORK

SUPREME COURT

COUNTY OF NIAGARA

[SAME TITLE]

The defendants, Ernest L. Fadel and Edmund L. Fadel, respectfully submit the following proposed findings of fact and conclusions of law for adoption by the Court herein:

FINDINGS OF FACT

1. At the time of the commencement of this action the defendants, Ernest L. Fadel and Edmund L. Fadel, were the assessed owners and in actual possession and occupancy of the premises in the City of Niagara Falls, New York, designated as Parcels 1872, 1873 and 1874 in the complaint herein, and described as follows:

> "ALL THAT TRACT OR PARCEL OF LAND, situate in the City of Niagara Falls, County of Niagara and State of New York, being a part of Lot No. 51 of the Mile Reserve and more particularly described as follows: BEGINNING at a point in the southerly line of Buffalo Avenue which point is four hundred sixteen (416) feet easterly measured along the southerly line of Buffalo Avenue from a point in the southerly line of Buffalo Avenue which latter point is five hundred one and forty-seven hundredths (501.47) feet easterly from the westerly line of Lot No. 51 of the Mile Reserve measured at right angles thereto, said point of beginning being the northeasterly corner of prem-

ises conveyed to John J. Janik by deed dated June 2, 1945, and recorded in Niagara County Clerk's office on July 25, 1945, in liber 785 of deeds at page 262; running thence easterly along the southerly line of Buffalo Avenue one hundred nine (109) feet to the northwesterly corner of lands conveyed to the Niagara Frontier Bridge Commission by deed recorded in Niagara County Clerk's office on May 15, 1934, in liber 592 of deeds at page 584; thence southerly along the westerly line of the lands so conveyed to the Niagara Frontier Bridge Commission to the southerly line of lands granted by the People of the State of New York to Louis F. Mayle by Letters Patent dated May 15, 1890, and recorded in Niagara County Clerk's office on May 23, 1890, in liber 198 of deeds at page 416; thence westerly along the southerly line of the lands so granted by the People of the State of New York to Louis F. Mayle to the point of intersection of said line with a line drawn through the point of beginning and parallel to the westerly line of Lot No. 51 of the Mile Reserve which line is also the easterly line of the premises conveyed to John J. Janik above mentioned; thence northerly along said parallel line to the southerly line of Buffalo Avenue at the point of beginning.

"TOGETHER with all the right, title and interest of the parties of the first part in and to all land and lands under water lying south of the premises herein described and between prolongations southerly of the easterly and westerly boundary lines of said premises."

"Found"—A. E. B.—J. S. C.

2. The land in question had been conveyed to the defendants' father and mother, both since deceased, by John W.

Defendants' Request to Find Made on Trial of Preliminary Issue as to Title

Broderick and Nancy M. Broderick, his wife, in October, 1945, and have been occupied and used by the defendants Ernest L. Fadel and Edmund L. Fadel, and their predecessors in title, as a gasoline service station since that time.

"Refused"—A. E. B.—J. S. C.

3. The westerly line of the premises which are the subject matter of this action is 917.47′ east of the west line of Lot 51 of the Mile Reserve and extends 109′ easterly along the south side of Buffalo Avenue to a point within 399.54′ of the east line of Lot 51.

"Refused"—A. E. B.—J. S. C.

4. The defendants' ownership and possession of the premises involved and claim of title thereto are based upon a chain of title which includes a conveyance thereof to Lewis Mayle from Clara W. Tucker, dated and recorded September 1, 1887, and a grant of Letters Patent to said Lewis Mayle from the State of New York, dated May 15, 1890, of lands then under water.

"Found"—A. E. B.—J. S. C.

5. The easterly line of the land conveyed on September 1, 1887, from Clara W. Tucker to said Lewis Mayle was 5.13 chains west of the east line of said Lot 51 and along said east line the land had a depth from north to south from the south line of the Buffalo-Thousand Islands and Portland Railroad right of way to the Niagara River of 30.86 chains, or 2036.76′.

"Found"—A. E. B.—J. S. C.

6. Along the aforesaid easterly line of land conveyed by Clara W. Tucker to Lewis Mayle aforesaid, on September 1, 1887, the Mile Reserve Line was a distance of 50.8 chains,

or 3352.8', north of the south line of the Buffalo-Thousand Islands and Portland Railroad right of way, making a total distance of 5389.56' between the Niagara River and the Mile Reserve Line along the easterly portion of said premises conveyed to Lewis Mayle.

"Refused"—A. E. B.—J. S. C.

7. On May 15, 1890, the State of New York, by Letters Patent, duly conveyed to Lewis Mayle lands under water in the Niagara River in front of the premises then owned by him and extending southerly into the bed of the River a distance of 3.03 chains, or 199.98'.

"Found"—A. E. B.—J. S. C.

8. That at the time of the issuance of the aforesaid Letters Patent to Lewis Mayle in 1890 the Niagara River along the easterly portion of lands then owned by Lewis Mayle, and including the lands involved herein, was 5389.56' south of the Mile Reserve Line.

"Refused"—A. E. B.—J. S. C.

9. That the intent, purpose and effect of the aforesaid Letters Patent issued to Lewis Mayle on May 15, 1890, was to extend the southerly limit of the lands owned by said Lewis Mayle 199.98' south of the south line of Lot 51 of the Mile Reserve, which south line in the area, including the lands involved herein was at least 5379' south of the Mile Reserve Line.

"Refused"—A. E. B.—J. S. C.

10. The premises involved herein, and assessed to, occupied and possessed by the defendants Ernest L. Fadel and Edmund L. Fadel at the time of the commencement of this action, actually extend southerly above water a dis-

tance of 500′ from the present south line of Buffalo Avenue, as shown on a survey thereof made by Perry Wilson, C. E., July 17, 1948.

"Found"—A. E. B.—J. S. C.

11. The southerly boundary of said lands above water, possessed and occupied by the defendants Ernest L. Fadel and Edmund L. Fadel at the time of the commencement of the action herein, is 5567.22′ south of the Mile Reserve Line along the east line of said premises.

"Refused"—A. E. B.—J. S. C.

12. The defendants Ernest L. Fadel and Edmund L. Fadel, at the time of the commencement of this action, were possessed of good title and owned the premises assessed to and occupied by them to a line at least 500′ south of the present south line of Buffalo Avenue, or a total distance of 5567.22′ south of the Mile Reserve Line.

"Refused"—A. E. B.—J. S. C.

13. There is no evidence in the record sufficient to establish that the plaintiff has title or right of possession superior to the defendants to any of the lands above water adjoining the Niagara River, assessed to, possessed and occupied by the defendants at the time of the commencement of this action.

"Refused"—A. E. B.—J. S. C.

14. The defendants Ernest L. Fadel and Edmund L. Fadel own and possess full riparian rights along the shores of the Niagara River adjacent and abutting the lands above water owned and occupied by them at the time of the commencement of this action.

"Found"—A. E. B.—J. S. C.

Defendants' Request to Find Made on Trial of Preliminary Issue as to Title

15. The defendants Ernest L. Fadel and Edmund L. Fadel and their predecessors in title have been in legal possession of the premises involved herein under claim of title adverse to that of plaintiff's assignor, the State of New York, since 1890, and in actual, open, adverse occupancy of all lands above water involved in this action since prior to 1926.

"Refused"—A. E. B.—J. S. C.

CONCLUSIONS OF LAW

1. The plaintiff has no title or right to possession superior to that of the defendants Ernest L. Fadel and Edmund L. Fadel as to any of the lands involved in this action, occupied and possessed by the defendants and taken by the plaintiff for public use.

"Refused"—A. E. B.—J. S. C.

2. The plaintiff's right to recover possession from the defendants Ernest L. Fadel and Edmund L. Fadel of the lands possessed and occupied by said defendants was not commenced within the time provided by law.

"Refused"—A. E. B.—J. S. C.

3. The defendants Ernest L. Fadel and Edmund L. Fadel are entitled to fair and just compensation from the plaintiff for the lands of said defendants Ernest L. Fadel and Edmund L. Fadel involved herein and for the riparian rights appurtenant thereto taken by the plaintiff for public use in this action.

"Found"—A. E. B.—J. S. C.

Dated: November 9th, 1962.

s/ ARTHUR ERVIN BLAUVELT
J. S. C.

Memorandum Decision of Appellate Division (Fourth Department) Filed June 25, 1964 on Appeal from Interlocutory Judgment

(Noted at 21 App. Div. 2d 854)

234. (Niagara Co.)—Power Authority of The State of New York, Appellant, *v.* Ernest L. Fadel and Edmund L. Fadel, Respondents.—Judgment insofar as appealed from unanimously affirmed with costs. (Appeal from part of an interlocutory judgment of Niagara Special Term, Blauvelt, J., condemning fee and riparian rights to certain property.) Present: Williams, P. J. Bastow, Henry, Noonan, and Del Vecchio, J. J.

Decision of the Appellate Division Denying Reargument and Leave to Appeal to the Court of Appeals

At a term of the Appellate Division of the Supreme Court of the State of New York in and for the Fourth Judicial Department, at the City of Rochester, N. Y., commencing on the 20th day of October, 1964.

Present—Hon. ALGER A. WILLIAMS, Presiding Justice.
" EARLE C. BASTOW,
" FREDERIC T. HENRY,
" ROBERT E. NOONAN,
" FRANK DEL VECCHIO,
Associate Justices.

POWER AUTHORITY OF THE STATE OF NEW YORK,
Appellant,

vs.

ERNEST L. FADEL and EDMUND L. FADEL,
Respondents.

The above named POWER AUTHORITY OF THE STATE OF NEW YORK, appellant herein, having, on the 16th day of October, 1964, duly moved before this Court for an order granting to it reargument of the appeal herein or in the alternative leave to appeal to the Court of Appeals from the order of affirmance heretofore and on the 25th day of June, 1964, duly made and entered herein by this Court,

Now, after reading and filing the affidavit of Thomas F. Moore, Jr., sworn to the 5th day of October, 1964, the notice of said motion, together with proof of due service thereof upon counsel for the opposing party, and the opposing affidavit of Salem G. Mansour, sworn to the 9th day of October, 1964, and upon all the proceedings heretofore had and taken herein, and due deliberation having been had thereon,

Decision of the Appellate Division Denying Reargument and Leave to Appeal to the Court of Appeals

IT IS HEREBY ORDERED, That the said motion be, and the same hereby is, denied in all respects.

Enter.

LESTER A. FANNING,

Entered 22nd day of October, 1964,

LESTER A. FANNING,
Clerk.

Memorandum Decision Rendered on Motion to Confirm Report of Commissioners of Appraisal (First Hearing)

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NIAGARA

[SAME TITLE]

PHELPS, GRAY, MANSOUR & HEWITT,
G. S. MANSOUR, Esq., of Counsel,
for Defendants,

THOMAS MOORE, Esq., (Edward D.
Siemer, Esq., of Counsel), for Plaintiff.

MEMORANDUM

O'DONNELL, J.

This is a motion made by the defendants to confirm the award of the Commissioners in certain condemnation proceedings concerning land in Niagara County, New York.

The Commissioners awarded to the defendants for their rights, title and interest in the subject property, at its market value as of the date of plaintiff's full possession thereof, the sum of $107,059.00. Of this sum $5,582.00 was awarded to the defendants as compensation for the taking and destruction of their riparian rights and easements of view and access over Parcel 1874 as an appurtenance to their fee ownership of Parcels 1872 and 1873.

The award recites the sum to be paid to the defendants is based upon the Commissioners' determination of the fair market value of the northerly 150 feet of Parcel 1872 together with improvements thereon for use as a gasoline service station and related parking facilities at the time of taking, and the balance of Parcel 1872, and all of Parcel 1873 for use as motel purposes.

Memorandum Decision Rendered on Motion to Confirm Report of Commissioners of Appraisal (First Hearing)

The Power Authority has objected to the award on the ground that the Commissioners determined the value of the parcels by basing value on reproduction cost as the determining factor. Their decision does not indicate in any manner that the reproduction cost was the basis for their award. Their award could be sustained as to value without accepting the defendants' testimony based on reproduction costs.

There is nothing in the decision from which can be inferred that the Commissioners considered any evidence that was not properly before them nor that the payment of $60,000.00 before trial in any manner influenced their findings.

The question of the reparian (riparian) rights in this case has previously been decided by Justice Arthur Ervin Blauvelt in decisions dated November 9, 1962, and August 31, 1963, in the matter of Power Authority of the State of New York *v.* Ernest L. Fadel and Edmund L. Fadel. This decision which held that the plaintiff is entitled to occupy and use Parcel 1874 for the public use upon making compensation therefor was affirmed by the Appellate Division in 252 Sup. 2d 312. The attorneys for the Power Authority strongly urge that the case of Federal Power Commission *v.* Union Electric Company, 381 U. S. 90, requires the Commissioners and this Court to hold that the riparian rights are not compensable. After a careful reading of this case, this Court is unable to agree with the Power Authority's contention. This Court holds that the rights were compensable and that the award is justified on the evidence in the case.

The award of the Commissioners is in all respects upheld.

Submit order accordingly.

DATED: December 14, 1965

THOMAS J. O'DONNELL
Justice of Supreme Court

Per Curiam Opinion of Appellate Division (Fourth Department) Entered May 11, 1967, in Reversing Final Judgment (First)

(Reported in 27 App. Div. 2d 398)

POWER AUTHORITY OF THE STATE OF NEW YORK, Appellant, *v.* ERNEST L. FADEL et al., Respondents.

APPEAL from the order of confirmation of the Supreme Court, (THOMAS J. O'DONNELL J.) entered January 10, 1966 in Niagara County, awarding $113,606.42 plus interest and statutory costs and disbursements to defendants and from a judgment of the Supreme Court, entered January 17, 1966 in Niagara County, awarding $129,470.66 to defendants.

Thomas F. Moore, Jr., for appellant.

Phelps, Gray, Mansour & Hewitt (Salem G. Mansour of counsel), for respondents.

Per Curiam. Following a trial before Commissioners of Appraisal, respondents were awarded $101,477 for land owned by them and appropriated by appellant and the additional sum of $5,582 for the taking of certain riparian rights. Possession of the property was taken in 1959 and there followed two trials before the court as to the right of respondents to be compensated for certain rights and easements that attached to a portion of their lands. The determination that they were so entitled was subsequently affirmed by this court (21 AD 2d 854). Commissioners of Appraisal were eventually appointed in November, 1964.

In the interim and in January, 1960 appellant made an advance partial payment to respondents of $45,000. In September, 1961 an additional $15,000 was paid. This was done pursuant to a somewhat elaborate written stipulation that provided, among other things, that the payments should not furnish any indication of value "nor shall any data, estimates or appraisals made or prepared by or on behalf of [the Authority] in support of such partial payment or otherwise be used by or be available to [claimants]

Per Curiam Opinion of Appellate Division (Fourth Department) Entered May 11, 1967, in Reversing Final Judgment (First)

or on the [claimants'] behalf on the trial of this proceeding as any proof or indication of the value of the property".

Upon the hearing herein appellant called a real estate expert who expressed opinions as to values of the property. On cross-examination he was asked about an earlier appraisal made by the witness in 1958. Finally counsel inquired if the figure of the expert "of $65,000 had been used by the Power Authority for purposes of making the statutory sixty percent prepayment?" Following objection it appears there was "Discussion off the record".

In opposing the motion to confirm the report of the Commissioners appellant's trial counsel submitted an affidavit in which it is stated that in the discussion "off the record" the Commissioners were told by claimants' trial counsel that $60,000 was the amount of the 60% payment, and that the commission would need to know these facts for the computation of interest. The record contains no denial under oath of this statement of appellant's counsel. While subsequently the Chairman of the commission stated that all this would be stricken from the record we view these acts as highly erroneous and mandating a new hearing before new Commissioners.

In the first place these partial prepayments did not constitute a statutory prepayment (cf. Highway Law, § 30) but were within the sole discretion of the Authority. It had the right to make advance payments to the total amount that it considered the property to be worth. We view this cross-examination and ensuing statements of trial counsel to be highly prejudicial to appellant. One of the Commissioners was a layman and none was a jurist trained in rejecting and ignoring inadmissible but revealed proof. Significantly the amount of the award for the land ($101,477) is only slightly in excess of 100% of the erroneously claimed 60% advance payments. We have recently

Per Curiam Opinion of Appellate Division (Fourth Department) Entered May 11, 1967, in Reversing Final Judgment (First)

written on this subject and there said that the purpose of such advance payments "could be frustrated and thwarted if partial-settlement offers are to be permitted in evidence and used as a basis for determination of value". *(Brummer* v. *State of New York,* 25 AD 2d 245, 249.)

Inasmuch as there must be a new hearing we direct attention to an inadequacy in the findings of the Commissioners herein. They found the highest and best use of the northerly 150 feet of one parcel to be for a service station; the remainder of that parcel and all of an adjoining parcel to be for motor hotel purposes. For all of this the value of $101,477 was fixed but there was no separation between the two parcels for which dissimilar uses had been found. Thus, an adequate review of the ultimate finding of value in the light of the testimony of the several experts may not be had. The burden rests on Commissioners, as well as a trial court, to state their findings and conclusions in sufficient particularity so as to permit intelligent judicial review. *(Wineburgh* v. *State of New York,* 20 AD 2d 961; *Ahleim* v. *State of New York,* 21 AD 2d 747, and *Conklin* v. *State of New York,* 22 AD 2d 481.)

The final judgment and order should be reversed on the law and facts and the matter remitted to Niagara County Supreme Court, Special Term, for appointment of new Commissioners and a new trial, with costs and disbursements to appellant.

Williams, P. J., Bastow, Henry and Del Vecchio, JJ., concur.

Order and judgment unanimously reversed on the law and facts and matter remitted to Niagara County Supreme Court, Special Term, for appointment of new Commissioners and a new trial, with costs and disbursements to appellant.

APPENDIX B

Constitutional Provision, Treaties and Statutes Involved

United States Constitution

ARTICLE 1, SECTION 8, CLAUSE 3

The Congress shall have Power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

Treaty With Great Britain Relating to Boundary Waters Between the United States and Canada, Signed January 11, 1909

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36 Stat. 2448

ARTICLE III.

It is agreed that, in addition to the uses, obstructions, and diversions heretofore permitted or hereafter provided for by special agreement between the Parties hereto, no further or other uses or obstructions or diversions, whether temporary or permanent, of boundary waters on either side of the line, affecting the natural level or flow of boundary waters on the other side of the line, shall be made except by authority of the United States or the Dominion of Canada within their respective jurisdictions and with the approval, as hereinafter provided, of a joint commission, to be known as the International Joint Commission.

The foregoing provisions are not intended to limit or interfere with the existing rights of the Government of the United States on the one side and the Government of the Dominion of Canada on the other, to undertake and carry on governmental works in boundary waters for the deepening of channels, the construction of breakwaters, the improvement of harbors, and other governmental works for the benefit of commerce and navigation, provided that such works are wholly on its own side of the line and do

not materially affect the level or flow of the boundary waters on the other, nor are such provisions intended to interfere with the ordinary use of such waters for domestic and sanitary purposes.

ARTICLE IV.

The High Contracting Parties agree that, except in cases provided for by special agreement between them, they will not permit the construction or maintenance on their respective sides of the boundary of any remedial or protective works or any dams or other obstructions in waters flowing from boundary waters or in waters at a lower level than the boundary in rivers flowing across the boundary, the effect of which is to raise the natural level of waters on the other side of the boundary unless the construction or maintenance thereof is approved by the aforesaid International Joint Commission.

It is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other.

ARTICLE V.

The High Contracting Parties agree that it is expedient to limit the diversion of waters from the Niagara River so that the level of Lake Erie and the flow of the stream shall not be appreciably affected. It is the desire of both Parties to accomplish this object with the least possible injury to investments which have already been made in the construction of power plants on the United States side of the river under grants of authority from the State of New York, and on the Canadian side of the river under licenses authorized by the Dominion of Canada and the Province of Ontario.

Treaty With Great Britain Relating to Boundary Waters Between the United States and Canada, Signed January 11, 1909

So long as this treaty shall remain in force, no diversion of the waters of the Niagara River above the Falls from the natural course and stream thereof shall be permitted except for the purposes and to the extent hereinafter provided.

The United States may authorize and permit the diversion within the State of New York of the waters of said river above the Falls of Niagara, for power purposes, not exceeding in the aggregate a daily diversion at the rate of twenty thousand cubic feet of water per second.

The United Kingdom, by the Dominion of Canada, or the Province of Ontario, may authorize and permit the diversion within the Province of Ontario of the waters of said river above the Falls of Niagara, for power purposes, not exceeding in the aggregate a daily diversion at the rate of thirty-six thousand cubic feet of water per second.

The prohibitions of this article shall not apply to the diversion of water for sanitary or domestic purposes, or for the service of canals for the purposes of navigation.

ARTICLE VII.

The High Contracting Parties agree to establish and maintain an International Joint Commission of the United States and Canada composed of six commissioners, three on the part of the United States appointed by the President thereof, and three on the part of the United Kingdom appointed by His Majesty on the recommendation of the Governor in Council of the Dominion of Canada.

ARTICLE VIII.

This International Joint Commission shall have jurisdiction over and shall pass upon all cases involving the use or obstruction or diversion of the waters with respect to which under Articles III and IV of this treaty the approval

of this Commission is required, and in passing upon such cases the Commission shall be governed by the following rules or principles which are adopted by the High Contracting Parties for this purpose:

The High Contracting Parties shall have, each on its own side of the boundary, equal and similar rights in the use of the waters hereinbefore defined as boundary waters.

The following order of precedence shall be observed among the various uses enumerated hereinafter for these waters, and no use shall be permitted which tends materially to conflict with or restrain any other use which is given preference over it in this order of precedence:

(1) Uses for domestic and sanitary purposes;

(2) Uses for navigation, including the service of canals for the purposes of navigation;

(3) Uses for power and for irrigation purposes.

The foregoing provisions shall not apply to or disturb any existing uses of boundary waters on either side of the boundary.

The requirement for an equal division may in the discretion of the Commission be suspended in cases of temporary diversions along boundary waters at points where such equal division can not be made advantageously on account of local conditions, and where such diversion does not diminish elsewhere the amount available for use on the other side.

The Commission in its discretion may make its approval in any case conditional upon the construction of remedial or protective works to compensate so far as possible for the particular use or diversion proposed, and in such cases may require that suitable and adequate provision, approved by the Commission, be made for the protection and indemnity against injury of any interests on either side of the boundary.

Treaty With Great Britain Relating to Boundary Waters Between the United States and Canada, Signed January 11, 1909

In cases involving the elevation of the natural level of waters on either side of the line as a result of the construction or maintenance on the other side of remedial or protective works or dams or other obstructions in boundary waters or in waters flowing therefrom or in waters below the boundary in rivers flowing across the boundary, the Commission shall require, as a condition of its approval thereof, that suitable and adequate provision, approved by it, be made for the protection and indemnity of all interests on the other side of the line which may be injured thereby.

The majority of the Commissioners shall have power to render a decision. In case the Commission is evenly divided upon any question or matter presented to it for decision, separate reports shall be made by the Commissioners on each side to their own Government. The High Contracting Parties shall thereupon endeavor to agree upon an adjustment of the question or matter of difference, and if an agreement is reached between them, it shall be reduced to writing in the form of a protocol, and shall be communicated to the Commissioners, who shall take such further proceedings as may be necessary to carry out such agreement.

Treaty With Canada Concerning Uses of the Waters of the Niagara River, Signed February 27, 1950

1 U.S.T. 694, T.I.A.S. 2130

Preamble

The United States of America and Canada, recognizing their primary obligation to preserve and enhance the scenic beauty of the Niagara Falls and River and, consistent with that obligation, their common interest in providing for the most beneficial use of the waters of that River,

Considering that the quantity of water which may be diverted from the Niagara River for power purposes is at present fixed by Article V of the treaty with respect to the boundary waters between the United States of America and Canada, signed at Washington January 11, 1909, between the United States of America and Great Britain, and by notes exchanged between the Government of the United States of America and the Government of Canada in 1940, 1941, and 1948, authorizing for emergency purposes temporary additional diversions,

Recognizing that the supply of low-cost power in northeastern United States and southeastern Canada is now insufficient to meet existing and potential requirements and considering that the water resources of the Niagara River may be more fully and efficiently used than is now permitted by international agreement,

Desiring to avoid a continuing waste of a great natural resource and to make it possible for the United States of America and Canada to develop, for the benefit of their respective peoples, equal shares of the waters of the Niagara River available for power purposes, and,

Realizing that any redevelopment of the Niagara River for power in the United States of America and Canada is not advisable until the total diversion of water which may be made available for power purposes is authorized permanently and any restrictions on the use thereof are agreed upon,

Treaty With Canada Concerning Uses of the Waters of the Niagara River, Signed February 27, 1950

Have resolved to conclude a treaty in furtherance of these ends * * *.

Text

ARTICLE I

This Treaty shall terminate the third, fourth, and fifth paragraphs of Article V of the treaty between the United States of America and Great Britain relating to boundary waters and questions arising between the United States of America and Canada dated January 11, 1909, and the provisions embodied in the notes exchanged between the Government of the United States of America and the Government of Canada at Washington on May 20, 1941, October 27, 1941, November 27, 1941, and December 23, 1948 regarding temporary diversions of water of the Niagara River for power purposes.

ARTICLE II

The United States of America and Canada agree to complete in acordance with the objectives envisaged in the final report submitted to the United States of America and Canada on December 11, 1929, by the Special International Niagara Board, the remedial works which are necessary to enhance the beauty of the Falls by distributing the waters so as to produce an unbroken crestline on the Falls. The United States of America and Canada shall request the International Joint Commission to make recommendations as to the nature and design of such remedial works and the allocation of the task of construction as between the United States of America and Canada. Upon approval by the United States of America and Canada of such recommendations the construction shall be undertaken pursuant thereto under the supervision of the International Joint Commission and shall be completed within four years after the date upon which the United States of America

and Canada shall have approved the said recommendations. The total cost of the works shall be divided equally between the United States of America and Canada.

ARTICLE III

The amount of water which shall be available for the purposes included in Articles IV and V of this Treaty shall be the total outflow from Lake Erie to the Welland Canal and the Niagara River (including the Black Rock Canal) less the amount of water used and necessary for domestic and sanitary purposes and for the service of canals for the purposes of navigation. Waters which are being diverted into the natural drainage of the Great Lakes System through the existing Long Lac-Ogoki works shall continue to be governed by the notes exchanged between the Government of the United States of America and the Government of Canada at Washington on October 14 and 31 and November 7, 1940, and shall not be included in the waters allocated under the provisions of this Treaty.

ARTICLE IV

In order to reserve sufficient amounts of water in the Niagara River for scenic purposes, no diversions of the water specified in Article III of this Treaty shall be made for power purposes which will reduce the flow over Niagara Falls to less than one hundred thousand cubic feet per second each day between the hours of eight a.m., E.S.T., and ten p.m., E.S.T., during the period of each year beginning April 1 and ending September 15, both dates inclusive, or to less than one hundred thousand cubic feet per second each day between the hours of eight a.m., E.S.T., and eight p.m., E.S.T., during the period of each year beginning September 16 and ending October 31, both dates inclusive, or to less than fifty thousand cubic feet per second at any other time; the minimum rate of fifty thousand

cubic feet per second to be increased when additional water is required for flushing ice above the Falls or through the rapids below the Falls. No diversion of the amounts of water, specified in this Article to flow over the Falls, shall be made for power purposes between the Falls and Lake Ontario.

ARTICLE V

All water specified in Article III of this Treaty in excess of water reserved for scenic purposes in Article IV may be diverted for power purposes.

ARTICLE VI

The waters made available for power purposes by the provisions of this Treaty shall be divided equally between the United States of America and Canada.

ARTICLE VII

The United States of America and Canada shall each designate a representative who, acting jointly, shall ascertain and determine the amounts of water available for the purposes of this Treaty, and shall record the same, and shall also record the amounts of water used for power diversions.

ARTICLE VIII

Until such time as there are facilities in the territory of one party to use its full share of the diversions of water for power purposes agreed upon in this Treaty, the other party may use the portion of that share for the use of which facilities are not available.

ARTICLE IX

Neither party shall be responsible for physical injury or damage to persons or property in the territory of the other which may be caused by any act authorized or provided for by this Treaty.

ARTICLE X

This Treaty shall be ratified and the instruments of ratification thereof exchanged at Ottawa. The Treaty shall come into force upon the date of the exchange of ratifications and continue in force for a period of fifty years and thereafter until one year from the day on which either party shall give notice to the other party of its intention of terminating the Treaty.

Reservation

"The United States on its part expressly reserves the right to provide by Act of Congress for redevelopment, for the public use and benefit, of the United States' share of the waters of the Niagara River made available by the provisions of the Treaty, and no project for redevelopment of the United States' share of such waters shall be undertaken until it be specifically authorized by Act of Congress."

Federal Power Act

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16 U.S.C. §§ 791a *et seq.*

Section 10

All licenses issued under this Part [Part I of the Federal Power Act] shall be on the following conditions:

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval. [41 Stat. 1068; 49 Stat. 842; 16 U.S.C. 803(a)]

• • •

(c) That the licensee shall maintain the project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmission of power, shall make all necessary renewals and replacements, shall establish and maintain adequate depreciation reserves for such purposes, shall so maintain and operate said works as not to impair navigation, and shall conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health, and property. Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto,

constructed under the license, and in no event shall the United States be liable therefor. [41 Stat. 1069; 49 Stat. 842; 16 U.S.C. 803(c)]

• • •

Section 21

That when any licensee can not acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided,* That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000. [41 Stat. 1074; 16 U.S.C. 814]

Niagara Redevelopment Act
Act of August 21, 1957, 71 Stat. 401
Public Law 85-159

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16 U.S.C. §§ 836, 836a

AN ACT

To authorize the construction of certain works of improvement in the Niagara River for power, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) the Federal Power Commission is hereby expressly authorized and directed to issue a license to the Power Authority of the State of New York for the construction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara River permitted to be used by international agreement.

(b) The Federal Power Commission shall include among the licensing conditions, in addition to those deemed necessary and required under the terms of the Federal Power Act, the following:

(1) In order to assure that at least 50 per centum of the project power shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use, the licensee in disposing of 50 per centum of the project power shall give preference and priority to public bodies and nonprofit cooperatives within economic transmission distance. In any case in which project power subject to the preference provisions of this paragraph is sold to utility companies organized and

administered for profit, the licensee shall make flexible arrangements and contracts providing for the withdrawal upon reasonable notice and fair terms of enough power to meet the reasonably foreseeable needs of the preference customers.

(2) The licensee shall make a reasonable portion of the project power subject to the preference provisions of paragraph (1) available for use within reasonable economic transmission distance in neighboring States, but this paragraph shall not be construed to require more than 20 per centum of the project power subject to such preference provisions to be made available for use in such States. The licensee shall cooperate with the appropriate agencies in such States to insure compliance with this requirement. In the event of disagreement between the licensee and the power-marketing agencies of any such States, the Federal Power Commission may, after public hearings, determine and fix the applicable portion of power to be made available and the terms applicable thereto: *Provided,* That if any such State shall have designated a bargaining agency for the procurement of such power on behalf of such State, the licensee shall deal only with such agency in that State. The arrangements made by the licensee for the sale of power to or in such States shall include observance of the preferences in paragraph (1) of this subsection.

(3) The licensee shall contract, with the approval of the Governor of the State of New York, pursuant to the procedure established by New York law, to sell to the licensee of Federal Power Commission project 16 for a period ending not later than the final maturity date of the bonds initially issued to finance the project works herein specifically authorized, four hundred and forty-five thousand kilowatts of the

remaining project power, which is equivalent to the amount produced by project 16 prior to June 7, 1956, for resale generally to the industries which purchased power produced by project 16 prior to such date, or their successors, in order as nearly as possible to restore low power costs to such industries and for the same general purposes for which power from project 16 was utilized: *Provided,* That the licensee of project 16 consents to the surrender of its license at the completion of the construction of such project works upon terms agreed to by both licensees and approved by the Federal Power Commission which shall include the following: (a) the licensee of project 16 shall waive and release any claim for compensation or damages from the Power Authority of the State of New York or from the State of New York, except just compensation for tangible property and rights-of-way actually taken, and (b) without limiting the generality of the foregoing, the licensee of project 16 shall waive all claims to compensation or damages based upon loss of or damage to riparian rights, diversionary rights, or other rights relating to the diversion or use of water, whether founded on legislative grant or otherwise.

(4) The licensee shall, if available on reasonable terms and conditions, acquire by purchase or other agreement, the ownership or use of, or if unable to do so, construct such transmission lines as may be necessary to make the power and energy generated at the project available in wholesale quantities for sale on fair and reasonable terms and conditions to privately owned companies, to the preference customers enumerated in paragraph (1) of this subsection, and to the neighboring States in accordance with paragraph (2) of this subsection.

(5) In the event project power is sold to any purchaser for resale, contracts for such sale shall

include adequate provisions for establishing resale rates, to be approved by the licensee, consistent with paragraphs (1) and (3) of this subsection.

(6) The licensee, in cooperation with the appropriate agency of the State of New York which is concerned with the development of parks in such State, may construct a scenic drive and park on the American side of the Niagara River, near the Niagara Falls, pursuant to a plan the general outlines of which shall be approved by the Federal Power Commission; and the cost of such drive and park shall be considered a part of the cost of the power project and part of the licensee's net investment in said project: *Provided,* That the maximum part of the cost of such drive and park to be borne by the power project and to be considered a part of the licensee's net investment shall not exceed $15,000,000.

(7) The licensee shall pay to the United States and include in its net investment in the project herein authorized the United States share of the cost of the construction of the remedial works, including engineering and economic investigations, undertaken in accordance with article II of the treaty between the United States of America and Canada concerning uses of the waters of the Niagara River signed February 27, 1950, whenever such remedial works are constructed.

SEC. 2. The license issued under the terms of this Act shall be granted in conformance with Rules of Practice and Procedure of the Federal Power Commission, but in the event of any conflict, the provisions of this Act shall govern in respect of the project herein authorized.

Approved August 21, 1957.

Rivers, Harbors and Flood Control Authorization Act of 1970

§ 111

Public Law 91-611, 84 Stat. 1818
(33 U. S. C. § 595a)

In all cases where real property shall be taken by the United States for the public use in connection with any improvement of rivers, harbors, canals, or waterways of the United States, and in all condemnation proceedings by the the United States to acquire lands or easements for such improvements, the compensation to be paid for real property taken by the United States above the normal high water mark of navigable waters of the United States shall be the fair market value of such real property based upon all uses to which such real property may reasonably be put, including its highest and best use, any of which uses may be dependent upon access to or utilization of such navigable waters. In cases of partial takings of real property, no depreciation in the value of any remaining real property shall be recognized and no compensation shall be paid for any damages to such remaining real property which result from loss of or reduction of access from such remaining real property to such navigable waters because of the taking of real property or the purposes for which such real property is taken. The compensation defined herein shall apply to all acquisitions of real property after the date of enactment of this Act, and to the determination of just compensation in any condemnation suit pending on the date of enactment hereof.

Submerged Lands Act

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43 U. S. C. §§ 1301 *et seq.*
(67 Stat. 29)

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§ 1301. *Definitions*

When used in this chapter—

• • •

(e) The term "natural resources" includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life but does not include water power, or the use of water for the production of power;

• • •

§ 1311. *Rights of the States—Confirmation and establishment of title and ownership of lands and resources; management, administration, leasing, development, and use*

(a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

Release and relinquishment of title and claims of the United States; payment to States of moneys paid under leases

(b) (1) The United States releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources; • • •

• • •

Authority and rights of the United States respecting navigation, flood control and production of power

(d) Nothing in this chapter shall affect the use, development, improvement, or control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation or flood control or the production of power, or be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power;

• • •

§ 1314. *Rights and powers retained by the United States; purchase of natural resources; condemnation of lands*

(a) The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 1311 of this title.

• • •

New York Public Authorities Law*
(Power Authority Act)

§ 1001. *Declaration of policy*

Those parts of the Niagara and Saint Lawrence rivers within the boundaries of the state of New York are hereby declared to be natural resources of the state for the use and development of commerce and navigation in the interest of the people of this state and the United States. In order to provide for the most beneficial use of these natural resources, for the creation and development of hydroelectric power in the interest of the people of this state, and to preserve and enhance the scenic beauty of the Niagara Falls and river, such natural resources, including the beds and waters of the said rivers as instrumentalities of commerce and navigation, and the beds, waters, power and power sites in, upon or adjacent to or within the watersheds of the said rivers, owned or controlled by the people of the state, or which may hereafter be recovered by or come within their ownership, possession and control, shall always remain inalienable to, and ownership, possession and control thereof shall always be vested in, the people of the state. [L.1939, c. 870; amended L.1951, c. 146, § 1, eff. March 20, 1951.]

§ 1002. *Power Authority of the State of New York*

For the purpose of effectuating the policy declared in section one thousand one of this chapter and of improving the Niagara and Saint Lawrence rivers as instrumentalities of commerce and navigation and developing the hydroelectric power resources thereof, there is hereby created a corporate municipal instrumentality of the state to be known as "Power Authority of the State of New York", hereinafter in this title referred to as "the authority", which shall be a body corporate and politic, a political subdivision of the state, exercising governmental and public

* The sections of the Public Authorities Law reprinted herein are those in effect in 1959 when the condemnation proceeding was commenced. Certain of the sections were amended in 1968 in a manner not material to the issues here involved.

powers, perpetual in duration, capable of suing and being sued, and having a seal, and which shall have the powers and duties hereinafter enumerated, together with such others as may hereafter be conferred upon it by law.

• • • [L.1939, c. 870; amended L.1951, c. 146, § 2, eff. March 20, 1951.]

§ 1005. *Powers and duties of authority*

Forthwith upon the appointment and organization of the trustees and subject to the conditions and limitations in this title contained, the authority, in cooperation with the proper Canadian authorities and those of the United States as hereinafter directed, shall proceed with the improvement and development of the Niagara river and the international rapids section of the Saint Lawrence river (which is defined as that part of the said river from Ogdensburg to the point where it leaves the territory of this state) for the aid and benefit of commerce and navigation and for the development of the hydro-electric power inherent therein in accordance with the provisions of this title.

The authority is authorized and directed:

1. To cooperate with the appropriate agencies and officials of the United States government to the end that any project undertaken under the authority of this title shall be consistent with and in aid of the plans of the United States for the improvement of commerce and navigation along the Niagara and Saint Lawrence rivers and shall be so planned and constructed as to be adaptable to the plans of the United States therefor, so that the necessary channels, locks, canals, and other navigational facilities may be constructed and installed by the United States, in, through, and as part of such project.

2. To negotiate with the appropriate Canadian authorities and agencies respecting the improvement and development of the Niagara river, and the international rapids section of the Saint Lawrence river for the aid and benefit of commerce and navigation

and the development of hydro-electric power therefrom, and to plan and agree with them upon cooperative action to that end including any shifting of international boundary lines between Canada and the United States and upon the use, control and disposition of the facilities to be created and the hydro-electric power to be developed by any project authorized by this title. Such negotiations and agreements shall be conducted and concluded with due regard to the position of the United States in respect to international agreements, and any such agreements as may be reached with Canadian authorities or agencies may be submitted by the authority to congress for its approval, if it be advised that such approval is necessary or desirable.

• • •

5. To develop, maintain, manage and operate those parts of the projects owned or controlled by it in such manner as to give effect to the policy hereby declared (and all plans and acts, and all contracts for the use, sale, transmission and distribution of the power generated by the said projects, shall be made in the light of, consistent with and subject to this policy), namely, that the projects shall be in all respects for the aid, improvement, and benefit of commerce and navigation in, through, along and past the Niagara river, the Saint Lawrence river and the international rapids section thereof, and that in the development of hydro-electric power therefrom such projects shall be considered primarily as for the benefit of the people of the state as a whole and particularly the domestic and rural consumers to whom the power can economically be made available, and accordingly that sale to and use by industry shall be a secondary purpose, to be utilized principally to secure a sufficiently high load factor and revenue returns to permit domestic and rural use at the

lowest possible rates and in such manner as to encourage increased domestic and rural use of electricity. In furtherance of this policy and to secure a wider distribution of such power and use of the greatest value to the general public of the state, the authority shall in addition to other methods which it may find advantageous make provision so that municipalities and other political sub-divisions of the state now or hereafter authorized by law to engage in the distribution of electric power may secure a reasonable share of the power generated by such projects, and shall sell the same or cause the same to be sold to such municipalities and political subdivisions at prices representing cost of generation, plus capital and operating charges, plus a fair cost of transmission, all as determined by the trustees, and subject to conditions which shall assure the resale of such power to domestic and rural consumers at the lowest possible price, provided, however, that in disposing of hydro-electric power pursuant to and in furtherance of the aforementioned policy and purposes, appropriate provision may also be made to allocate a reasonable share of project power to agencies created or designated by other states and authorized to resell the power to users under the same terms and conditions as power is disposed of in New York state. To that end, the authority may provide in any contract or contracts which it may make for the sale, transmission and distribution of the power that the purchaser, transmitter or distributor shall construct, maintain and operate, on such terms as the authority may deem proper, such connecting lines as may be necessary for transmission of the power from main transmission lines to such municipalities or political subdivisions.

• • •

[L.1939, c. 870; amended L.1949, c. 612, §§ 1, 2; L.1951, c. 146, §§ 3-12, eff. March 20, 1951.]

New York Public Authorities Law
(Power Authority Act)

§ 1008. *Consent of state*

The state of New York hereby consents to the occupation and use by the authority of any and all property of the state of whatever kind or character on the Niagara river or within the international rapids section of the Saint Lawrence river, and hereby vests the authority with and delegates to it the right to exercise any and every right and power of the state in connection therewith, whether proprietary or sovereign in character, which the state itself might exercise, provided that such consent and delegation of power shall not permit the impairment or limit or prevent the future improvement of the navigability of the Niagara river or the international rapids section of the Saint Lawrence river, consistent with the maintenance of such projects, but on the contrary the projects shall be such as will improve and benefit commerce and navigation therein and provided further that the authority shall have no power to limit, waive or surrender any right or interest of the state of New York in such rivers or the use thereof. [L.1939, c. 870; amended L.1951, c. 146, § 14, eff. March 20, 1951.]

§ 1012. *Exemption from taxation*

It is hereby found and declared that the projects authorized by this title are for the aid and improvement of commerce and navigation and that such aid and improvement of commerce and navigation and the development, sale and distribution of hydro-electric power is primarily for the benefit of the people of the state of New York, for the improvement of their health and welfare and material prosperity, and is a public purpose, and the authority shall be regarded as performing a governmental function in undertaking such projects and in carrying out the provisions of this title, and shall be required to pay no taxes or assessments upon any of the property acquired by it for such

projects or upon its activities in the operation and maintenance thereof. The securities and other obligations issued by the authority, their transfer and the income therefrom shall, at all times, be free from taxation within this state. It is furthermore declared that the object and purpose of this title is that such projects shall be in all respects self-supporting. [L.1939, c. 870; formerly § 1013, renumbered 1012, L.1949, c. 612, § 6; amended L.1951, c. 146, § 16, eff. March 20, 1951.]

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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1628

POWER AUTHORITY OF THE STATE OF NEW YORK,

Petitioner,

vs.

ERNEST L. FADEL and VARSEN FADEL, as Executrix of the Last Will and Testament of Edmund L. Fadel,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

The proceeding herein was commenced pursuant to Section 1007 of the New York Public Authorities Law and the Condemnation Law to acquire by condemnation respondents' uplands and riparian rights and easements appurtenant to such uplands in filled-in lands formerly under water. The rights of the parties hereto are accordingly governed by the laws of the State of New York subject to any overriding Federal right vested in the petitioner. This is pointed out at this time because of petitioner's continuous erroneous assertion in its brief that this condemnation proceeding is brought by it pursuant to the Federal statute governing condemnation. Its insistence that this is

a *Federal* condemnation proceeding rather than a State condemnation proceeding arises from its attempt to distinguish, on this basis, the holding adverse to it found in *Grand River Dam Authority vs. Grand Hydro*, 335 U. S. 359, (See page 21 of petitioner's brief.)

The judgment of the Court of Appeals, which petitioner seeks to review, unanimously affirmed an award to the respondents of $5,000.00 as compensation for the appropriation of their riparian rights and easements appurtenant to the uplands condemned by the petitioner for the construction of the Niagara Power Project. In 1958 the petitioner was granted a license by the Federal Power Commission for the sole, express purpose, as stated in the license, "of developing all of the waters of the Niagara River which it is permissible to divert for power purposes in the United States" (page 11, pages 8, 9 and 10, ex. 44). This license was issued pursuant to the provisions of Public Law 85-159, 85th Congress, approved August 21, 1957, which also provided explicitly as follows:

> "The Federal Power Commission is hereby expressly authorized and directed to issue a license to the Power Authority of the State of New York for the construction and operation of a power project."

A reading of the statute and of the license immediately discloses that neither one contemplated or provided that the purpose of the licensed project was the improvement of navigation on the Niagara River. Accordingly, the judgment herein, unanimously affirmed by the Court of Appeals, rests upon the indisputable fact that the respondents' riparian rights and easements appurtenant to the uplands appropriated by the petitioner were *not* taken for the purpose of improving navigation and commerce on the Niagara River. It is in the light of this indisputable fact that the contention of the petitioner that the judgment herein is erroneous, as a matter of law, must be examined.

The Issue Involved

On pages 2 and 3 of its brief the petitioner purports to set forth the questions presented to this Court. It is respectfully submitted that the four questions which it lists are inaccurate and do not constitute a proper statement of the issue involved. Question No. 1, found on page 2, is inaccurate because the property herein was not condemned pursuant to Section 21 of the Federal Power Act. Questions No. 2, 3 and 4 incorporate in them assumptions of fact and of law which are wholly unfounded and are irrelevant to the true issue before this Court.

The only issue involving a federal question which is properly before this Court upon this petition may be stated as follows: May a licensee of the Federal Power Commission, granted a license to use the Niagara River *solely* for a hydroelectric power project, appropriate the uplands of the respondents without paying compensation to them for the value of the riparian rights and easements in lands formerly under water which are appurtenant to and add a substantial increment to the value of the uplands?

The petitioner's contention is that its position as a licensee pursuant to a license authorized by congressional action grants it an immunity against the payment of compensation for the taking of the respondents' riparian rights and easements in lands formerly under water, appurtenant to uplands condemned, even though the taking was not for the purpose of improving navigation and commerce on the Niagara River. Its argument is that the power project was related to "commerce" and that riparian rights and easements may be taken for any commercial purpose by a Federal licensee without the payment of compensation. It asserts that in this respect it enjoys the same "dominant servitude" over riparian rights that the United States itself enjoys when such rights are appropriated pursuant to an

express act of Congress determining that such appropriation is essential for purposes of improving navigation and commerce on a navigable stream.

The State courts below have unanimously rejected this contention of the petitioner. In its memorandum decision found on pages 2a and 3a of petitioner's Appendix, the Court of Appeals said:

> "We find nothing in plaintiff's license or in the treaty and the legislative and administrative action and procedures underlying it, and certainly no clear authorization there or elsewhere, supportive of plaintiff's contention that the right to exercise the dominant servitude, in favor of the United States, in respect of defendants' water rights, devolved upon it, so as to exempt it from payment of compensation for their taking. (*Federal Power Comm. v. Niagara Mohawk Power Corp.*, 347 U. S. 239, 249; *Henry Ford & Son v. Little Falls Fibre Co.*, 280 U. S. 369; *Public Utility Dist. No. 1 of Pend Oreille County v. City of Seattle*, 382 F. 2d 666.) Our conclusion in this regard renders academic the other issues tendered by the appeal."

It is respectfully submitted that a brief examination of the pertinent law applicable to the issue herein completely supports the correctness of the conclusion and judgment of the Court of Appeals.

No Valid Reason Exists in Fact or in Law for the Granting of the Writ Herein

In its brief the petitioner seeks to find support for its contention in the history of the Niagara River. However, reference to the 1909 treaty between the United States and Great Britain relative to the boundary waters between the United States and Canada and the 1950 treaty between the United States and Canada relative to the construction by the two countries of remedial work and governing the diversion of Niagara water are completely irrelevant and

immaterial to the issues herein. Public Law 85-159, the Niagara Redevelopment Act, (set forth at pages 13b-16b of petitioner's Appendix) which authorized the Federal Power Commission to issue a license to the Power Authority for the express and sole purpose of "the construction and operation of a power project", nowhere contains any specific grant of immunity to the petitioner from the constitutional requirement to pay just compensation for the taking of riparian rights and easements of other persons. On the contrary, the enabling statute points unmistakably in the opposite direction. Section b(3) of that Act requires that the Power Authority shall sell 445,000 kilowatts of power to the then licensee of Project 16 (the then operating Niagara Mohawk Company) on condition that such project 16 licensee surrender its license, upon certain terms which significantly included the following:

> "(a) the licensee of project 16 shall waive and release any claim for compensation or damages from the Power Authority of the State of New York or from the State of New York, except just compensation for tangible property and rights-of-way actually taken, and (b) without limiting the generality of the foregoing, the licensee of project 16 shall waive all claims to compensation or damages based upon loss of or damage to riparian rights, diversionary rights, or other rights relating to the diversion or use of water, whether founded on legislative grant or otherwise."

The very fact that the statute includes an express provision for the waiver by the licensee of project 16 (Niagara Mohawk) of all claims for damages based upon loss of or damage to its riparian rights constitutes the clearest kind of recognition by Congress that, in the absence of such waiver, an owner of riparian rights must be compensated for the taking thereof for purposes of the Niagara Power Project. The congressional recognition of the necessity for expressly providing for a waiver of such right as to the

licensee of project 16 is completely destructive of petitioner's claim that Congress, in authorizing the issuance of a license to it, itself exercised its "dominant servitude" over the Niagara River or conferred it on petitioner so as to entitle the petitioner, as a licensee, to appropriate riparian lands, rights and easements of other property owners without the payment of compensation.

In the same way, the license issued to the petitioner by the Federal Power Commission completely negatives its contention that it was vested thereby with the right to take riparian rights and easements of others without compensation. On page 7 of Ex. 44 (the license) the Federal Power Commission considered the request of the International Paper Company, an intervenor in the proceeding, that a condition be included in the license which would recognize and protect its riparian right which entitled it to the use of 700 cubic feet per second of water from the Niagara River for hydroelectric development. In the license issued the Commission said in this connection:

> "In our view we are not required to pass upon the claim of International Paper Company in this proceeding, and consequently, we are not including in the license any of the alternative conditions requested by the Company. However, if it has a valid claim against the Power Authority of the State of New York, the Company will be protected by Section 10 (c) of the Act (16 U. S. C. 803 (c)) which reads in part as follows:
>
> '• • • Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor.' "

It is respectfully submitted that this is a clear recognition by the Federal Power Commission that under Federal

law, the riparian rights of the International Paper Company to use water of the Niagara River are entitled to protection and compensation and that the petitioner herein, as a licensee, was subject to liability if its project affected these rights. The very license itself contained in it an express provision that it is issued to the petitioner subject to the provisions of Section 10 (c) of 16 U. S. C. 803 (c) above quoted. Rather than relieving the petitioner from liability for damages caused to the riparian rights of other persons by its project, the license expressly confirms the existence of such liability.

Furthermore, the Federal Water Power Act (16 U. S. Code) by Section 821 expressly reserves and protects existing water rights from impairment by anything done under the Act. Section 821 thereof, entitled "State Laws and Water Rights Unaffected" reads as follows:

> "Nothing contained in this Chapter shall be construed as affecting or intending to affect or in any way interfere with the laws of the respective states relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

From the foregoing it is crystal clear that neither by congressional enactment or by the license of the Federal Power Commission has the petitioner ever been granted the Federal "dominant servitude" over the Niagara River which entitled it to appropriate respondents' uplands without payment for the valuable and vested riparian rights and easements appurtenant thereto. There is no question that the purpose of the license, the development of electric power, was a commercial one;—respondents have never claimed the contrary. However, taking of property *for that kind of commercial purpose* does not constitute a condemnation for the purpose of "navigation and commerce

on the Niagara River" which is the only purpose which permits the taking of riparian rights and easements of others without the payment of just compensation.

The petitioner has also called to the attention of the Court Public Law 91-611, 84 Stat. 1818 enacted December 31, 1970, included as Section 111, 32 U. S. C. Section 595 A. This statute provides explicitly that in condemnation proceedings brought by the United States for the improvement of rivers, harbors and waterways the compensation to be paid for real property above the high water mark of navigable waters shall be the fair market value of such property "based upon all uses to which such real property may reasonably be put, including its highest and best use, many of which uses may be dependent upon access to or utilization of such navigable waters."

The purpose of this statute was to limit the effect of the Federal "dominant servitude". Its enactment now makes it necessary, when uplands are taken by the United States, to pay, as an increment to the value of such uplands, the value attaching thereto by reason of their riparian location. This enactment now makes applicable to the United States itself the same rule of damages in cases where property with riparian rights and easements is appropriated, even for navigational purposes, as is applicable in all other cases of condemnation.

The petitioner's discussion of the history of the legislation is both immaterial and irrelevant. The statute itself, as enacted, has now limited the immunity which even the United States itself enjoyed, under its dominant servitude, in condemning land to which riparian rights and easements attached, even for navigation purposes. If there were any validity to petitioner's claim that it stands in the shoes of

the United States, then this statute strikes another destructive blow at its contention herein, because in all condemnation proceedings now pending, riparian rights and easements appurtenant to fast lands taken for public purpose, even by the United States itself, are compensable.

From the foregoing it readily appears that there is no statutory support whatsoever for the petitioner's claim that it was vested with the Federal "dominant servitude". For all purposes in this proceeding, its status is simply that it is the holder of a license issued by the Federal Power Commission to use the Niagara River for the purposes of a power project, with all the responsibilities and liabilities attaching thereto. As such licensee, it was bound by the provisions of Section 803 (c) and Section 821 of the Federal Water Power Act which respectively made it liable for all damages caused to the property of others and which expressly protected vested rights of others in the use of the water affected. No act of Congress has relieved it of this responsibility.

With this statutory background reference may now be had to the decisions of the Supreme Court, relied upon by the New York Court of Appeals, whose holdings are diametrically opposite to the petitioner's contention herein. In *Henry Ford and Son vs. Little Falls Fiber Co.*, 280 U. S. 369, the unanimous Court held that a riparian owner in the navigable Mohawk River was entitled to an injunction against the uncompensated destruction of its riparian rights by a subsequent licensee under the Federal Water Power Act. This was followed by the decision in *Federal Power Commission vs. Niagara Mohawk Power Corp.*, 347 U. S. 239 wherein the Court discussed in detail and approved fully the holding in *Henry Ford and Son* and again confirmed the principle that a licensee under the Federal

Water Power Act was required to compensate persons for the taking of riparian rights for a project unconnected with purposes of navigation.

The clear and unmistakable holdings, contrary to the petition herein, of the *Niagara Mohawk* case and the case of *Henry Ford and Son* merit setting forth in some detail herein the opinion of this Court in the *Niagara Mohawk* case. On pages 246-247 of the *Niagara Mohawk* decision this Court described the rights of a licensee of the Federal Power Commission for the development of electric power as: "usufructuary rights to use the water for the generation of power as distinguished from claims to the legal ownership of the running water itself". The Court went on to hold that even the exercise by the Federal Government of its dominant servitude over navigable waters did not include taking, without compensation, other rights preexisting under State law in the absence of "clear authorization" (page 249). An example of such authorization, the Court held, was found in the Act of March 3, 1909, considered and passed upon in the case of the *United States vs. Chandler-Dunbar Power Co.*, 229 U. S. 53 concerning which the Court said:

> "A classic example of such a clear authorization appears in the *United States vs. Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 57 L. ed. 1063, 33 S. Ct. 667. The Act of March 3, 1909, there authorized the exercise of the dominant right of the United States to take all of a navigable river's flow for purposes of interstate commerce. It did so in explicit terms. * * *
>
> "In that case the Government took the entire flow of the stream exclusively for purposes of interstate commerce. The Court accordingly recognized the Government's absolute right, within the bed of the stream, to use all of the waters flowing in the stream, for purposes of interstate commerce, without compensating anyone for the use of those waters.

"That decision is not applicable here. The issue here is whether the much more general and regulatory language of the Federal Water Power Act shall be given the same drastic effect as was required there by the language of the Act of March 3, 1909. We find nothing in the Federal Water Power Act justifying such an interpretation. Neither it, nor the license issued under it, expressly abolishes any existing proprietary rights to use waters of the Niagara River. Unlike the statute in the *Chandler-Dunbar* Case, the Federal Water Power Act mentions no specific properties. It makes no express assertion of the paramount right of the Government to use the flow of the Niagara or of any other navigable stream to the exclusion of existing users * * * *

"The Act treats usufructuary water rights like other property rights. While leaving the way open for the exercise of the federal servitude and of federal rights of purchase or condemnation, there is no purpose expressed to seize, abolish or eliminate water rights without compensation merely by force of the Act itself.

"The references in the Act to preexisting water rights carry a natural implication that those rights are to survive, at least until taken over by purchase or otherwise. Riparian water rights, like other real property rights, are determined by state law. Title to them is acquired in conformity with that law. The Federal Water Power Act merely imposes upon their owners the additional obligation of using them in compliance with that Act.

"The legislative history of the Act discloses no substantial support for the drastic policy which the Commission seeks to read into it. To convert this Act from a regulatory Act to one automatically abolishing preexisting water rights on a nation wide scale calls for a convincing explanation of that purpose. We find none. In fact, the legislative history points the other way" (Pages 249-253).

Following this explicit holding that licenses for a power project, issued pursuant to the Federal Water Power Act,

do not authorize the destruction of existing riparian rights without compensation, the Court went on to discuss with approval the case of *Henry Ford and Son, supra,* which expressly held that a Federal licensee could not take water riparian rights of others without payment of compensation therefor. On pages 254-255 of the opinion the Court said:

> "In 1930, this Court passed upon the basic question now before us when it came here in a different connection. In Henry Ford & Son v. Little Falls Fibre Co., 280 U. S. 369, 74 L. ed. 483, 50 S. Ct. 140, Mr. Justice Stone, writing for a unanimous Court, held that a riparian owner of a right to use water for power purposes in the navigable Mohawk River, in New York State, was entitled to an injunction against the uncompensated destruction of that right by a subsequent licensee under the Federal Water Power Act. The New York Supreme Court had granted such an injunction and awarded damages. This Court affirmed that decision, although the federal license then before the Court had authorized the licensee to raise the navigable waters of the Hudson River to such an extent that they would destroy the value of the riparian owner's right, under state law, to use the fall of tributary waters of the Mohawk for power purposes. It was thus held that the Federal Water Power Act had not abolished the complainant's private proprietary water rights, existing under New York law, to use navigable waters for power purposes.
>
> "Even though the rights which the respondents (the riparian owners) here assert be deemed subordinate to the power of the national government to control navigation, the present legislation does not purport to authorize a licensee of the Commission to impair such rights recognized by state law without compensation" *Id.* 280 U. S. at 337.
>
> "After quoting from 10 (e) (liability for damages caused by the licensed project), 27 (saving clause as to proprietary rights under state law), 21 (condemnation rights) and 6 (licensee's acceptance of the conditions of the Act), the Court added:

"'While these sections are consistent with the recognition that state laws affecting the distribution or use of water in navigable waters and the rights derived from those laws may be subordinate to the power of the national government to regulate commerce upon them, they nevertheless so restrict the operation of the entire act that the powers conferred by it on the Commission do not extend to the impairment of the operation of those laws or to the extinguishment of rights acquired under them without remuneration. We think the interest here asserted by the respondents, so far as the laws of the state are concerned, is a vested right acquired under those laws and so is one expressly saved by 27 from destruction or appropriation by licensees without compensation, and that it is one which petitioner (the licensee), by acceptance of the license under the provisions of 6, must be deemed to have agreed to recognize and protect.' *Id.* 280 U. S. at 378, 379."

No comment or argument is necessary in order to emphasize how clearly and explicitly the principle of law embodied in the above decisions support the correctness of the judgment herein and destroy the validity of the petitioner's argument in this proceeding. The more recent case of *Public Utility District No. 1 et al. vs. City of Seattle,* 382 F. 2d 666 (9th Cir. 1967) Cert. dismissed 369 U. S. 803, expressly answered in the negative the claim of a licensee under the Federal Power Act that it could condemn uplands and shorelands with riparian rights appurtenant thereto without the payment of compensation for the riparian rights and easements. It rejected the claim of the licensee that its license to construct a hydro project *ipso facto* vested it with the same dominant navigational servitude as enjoyed by the United States itself. In so holding, the majority of the Court said it was of significance that Congress had not expressly bestowed upon the licensee the full measure of its constitutional power (page 670) quoting with approval *Federal Power*

Commission vs. Niagara Mohawk, supra, wherein the Court said:

> "The exercise of that servitude, without making allowances for preexisting rights under State law, requires clear authorization."

The Court also held that the rights and liabilities of the parties involved were the same whether the condemnation proceeding was one in Federal Court, under the Federal Power Act, as in the *Seattle* case, or one brought in State Courts, under State Condemnation Law, such as the case herein. The majority then concluded that a Federal licensee must pay full compensation for all riparian rights and shorelands taken for the purpose of a hydro project.

The dissent in that case was based upon the view of one Judge, unsupported by any authority, that a licensee who brings a condemnation action in Federal Court pursuant to the provisions of the Federal Power Act stands in a different position than a condemnor in a State condemnation proceeding and is *ipso facto* vested with the government's dominant navigational servitude. Even if there were any validity to this distinction, it is of no help to the petitioner herein because the judgment sought to be reviewed was one entered in a New York State condemnation proceeding brought by the petitioner pursuant to the State Condemnation Law and the State Public Authorities Law.

Reference may also be had to the Supreme Court decision of *Grand River Dam Authority v. Grand Hydro,* 335 U. S. 359, wherein this Court reviewed and affirmed a final judgment of the Oklahoma State Court requiring a licensee of the Federal Power Commission to pay compensation for riparian and water rights condemned by it. On page 21 of its brief the petitioner seeks to distinguish this case on the ground that therein the condemnation proceeding was

brought in State Courts and under State laws. This provides no basis for distinction because the proceeding herein is exactly of the same nature; it was brought in the State Courts of New York pursuant to the State Condemnation Law and the State Public Authorities Law.

Reference to the cases cited by the petitioner on page 10 of its brief, excerpts from which are quoted and discussed out of context, reveals that in no way do they negative the correctness of the judgment herein, nor do they support the petitioner's contention. *United States v. Appalachin Power Co.*, 311 U. S. 377 involved a decision wherein the Supreme Court, after finding that the New River was a navigable stream, held that the defendant could not construct a dam upon it without a license therefor from the Federal Power Commission.

In *United States v. Commodore Park*, 324 U. S. 386 the Court held that the claimant could not recover damages for the destruction of riparian rights as a result of work done by the United States itself in the interest of improvement of navigation. The Court noted that there had been no taking or damage to claimant's fast lands, but only an interference with its ability to use a creek adjacent to them. In the absence of the taking of the claimant's fast lands the Courts held that the waters adjoining may be altered by the United States in the interests of navigation without liability for damages. This case illustrates the application to the United States itself of the immunity conferred by its dominant navigational servitude when riparian rights are affected for the purpose of improving navigation. This of course has no application to the facts involved in the instant case.

United States v. Twin City Power Co., 350 U. S. 222 presented a situation where claimant's property was taken

pursuant to a specific act of Congress authorizing the Clark Hill Project for the expressly stated purposes of hydroelectric development, flood control and improvement of navigation. The lower Courts had held that improvement of navigation was not the real purpose of the taking and hence claimant's riparian rights appurtenant to fast lands taken were compensable.

In reversing, a majority of the Supreme Court held that the Courts may not substitute their judgment concerning the purpose of a Federal project for the congressional decision on what is necessary for the improvement or protection of navigation. In this respect the Court said, "The decision of Congress that this project will serve the interests of navigation involves engineering and policy considerations for Congress and Congress alone to evaluate." After pointing out that the power of the United States over the flow of a navigable stream is a privilege called a "dominant servitude" or a "superior navigation easement" the majority opinion said, on page 225:

> "The legislative history and construction of particular enactments may lead to the conclusion that Congress exercised less than its constitutional power, fell short of appropriating the flow of the river to the public domain and provided that private rights existing under State law should be compensable or otherwise recognized. Such were *United States v. Gerlock Live Stock Co.*, 339 U. S. 725 and *Federal Power Commission v. Niagara Mohawk*, 347 U. S. 239. We have a different situation here, one where the United States displaces all competing interests and appropriates the entire flow of the river for the declared public purpose."

This case is authority simply for the proposition that a congressional declaration to the effect that the project is for the purpose of promoting navigation is conclusive in

determining whether or not riparian rights condemned for such purpose are compensable or not. In the proceeding before this Court there is, of course, no congressional affirmation that the Niagara River project was for the purpose of promoting navigation on the Niagara River. On the contrary, both the enabling statute and the license limited the project to the sole purpose of developing hydro power, a situation wherein the dominant navigational servitude has no application.

Four Judges dissented upon the ground that even the exercise of the Federal navigational servitude did not exempt the United States from the payment of full compensation for fast lands taken which should include within it the value of riparian rights and easements appurtenant thereto and not dependent upon the flow of water.

United States v. Grand River Dam Authority, 363 U. S. 229 is another decision resting upon the express congressional declaration that the Federal project for which claimant's water power rights were taken was "one for the benefit of navigation and the control of destructive flood waters." The Court again held that it was for Congress to determine the project's purposes, that such determination was binding and that the claimant's water rights were subordinate to the Federal "superior navigation easement which precludes private ownership of the water or its flow."

In *United States v. Virginia Electric and Power Co.*, 365 U. S. 624 the Supreme Court adopted and applied the view of the dissenting Judges in the *Twin City* case, limiting the extent of the immunity enjoyed by the United States when it condemned fast lands for purposes of improving navigation. The Court held that while the Federal dominant servitude allowed the United States, for

the purposes of navigation, to destroy the availability of a stream for water power purposes without compensation to adjoining property owners, it did not absolve the government from paying compensation for easements and increments in value, non-riparian in nature, which were appurtenant to the fast lands condemned. Obviously this holding provides no support for the petitioner herein. Rather, the Supreme Court recognized that the owners of fast lands condemned, to which attached appurtenant riparian rights and easements, must be compensated for such rights and easements as are not related to water, water power or hydroelectric development. In this respect, the *Virginia Electric and Power Co.* case further confirms the correctness of the judgment herein awarding to the defendants the value of their rights and easements in lands formerly under water unrelated to water use and appurtenant to the adjoining uplands taken in condemnation.

Federal Power Commission v. Union Electric Co., 381 U. S. 90 holds simply that a Federal license was necessary for the development of hydroelectric power even on a non-navigable stream. Of course this case in no way touches the issue before this Court.

Finally, the case of *United States v. Rands*, 389 U. S. 121 involves only another holding that the dominant navigational servitude of the United States, when exercised for purposes of navigation, is superior to the riparian rights of private owners because the Federal government occupies a unique position. Hence, it was held that a United States project, specifically authorized by Congress as part of a comprehensive plan for the development of the Columbia River, was an exercise by the United States of its dominant servitude pursuant to the power to regulate navigation.

Hence it followed, said the Court, that riparian rights, even though good against a State under State law, must yield to the superior rights of the United States itself, when taken for the purposes of improving navigation, pursuant to an express congressional enactment.

Upon the foregoing, it is respectfully submitted that the petitioner has wholly failed to establish any grounds upon which the correctness of the final judgment of the New York State Court of Appeals herein can be questioned so as to merit the granting of certiorari herein. There exists no congressional authorization to the petitioner vesting it with the dominant servitude which is unique to the United States Government itself. It is undisputed that the petitioner possesed only a license to use the water of the Niagara River for purposes of a hydroelectric project, wholly unconnected with and unrelated to the promotion of navigation. The decided cases are unanimous and conclusive in their holding that such a licensee is not *ipso facto* vested with the unique dominant servitude possessed by the government of the United States itself. In the absence of such express vesting, the rights and responsibilities of a licensee which condemns fast lands to which riparian rights and easements are appurtenant, for a purpose other than navigation, must be determined in accordance with State law, which requires payment therefor.

This conclusion is inescapable in view of the fact that even when the United States itself exercises its dominant servitude for the purpose of improving navigation, it enjoys no immunity from the payment of just compensation for easements and increments of value, unrelated to water use, which are appurtenant to fast lands condemned (*United States v. Virginia Electric and Power Co., supra*). Such are the rights and easements involved in the instant case, payment for which is required by the judgment herein.

The correctness of this judgment is further emphasized by the provisions of Public Law 91-611 which makes compensable appurtenant riparian rights and easements to uplands appropriated even by the United States itself for purposes of navigation, thereby foreclosing any claim of immunity in favor of the petitioner based upon its assertion that it stands in the shoes of the United States Government. Accordingly, it is respectfully submitted that the Petition for Writ of Certiorari to review the final judgment of the New York State Court of Appeals herein should be denied, as a matter of law.

Respectfully submitted,

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